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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE BOARD OF OPERATIVES OF THE AMERICAN CAST IRON PIPE COMPANY AND THE JOHN J. EAGAN TRUST, *et al*,
Petitioners,

v.

THE BOARD OF MANAGEMENT OF THE AMERICAN CAST IRON PIPE COMPANY AND THE JOHN J. EAGAN TRUST, *et al,*
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT

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Pursuant to Rule 28.1 American Cast Iron Pipe Company has the following subsidiaries:

American Valve & Hydrant
Beaumont, Texas

Specification Rubber Products, Inc.
Alabaster, Alabama

QUESTIONS PRESENTED

1. Is a racially discriminatory scheme for the control of a perpetual charitable trust with both black and white beneficiaries violative of Title VII of the 1964 Civil Rights Act, 42 U.S.C. Section 2000e and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

2. Does a scheme of charitable trust governance adopted and approved by an Alabama court in 1942 when blacks were beneficiaries of the trust, but specifically excluded from election as trustees, and which "locks in" or "freezes" in place all white dominance of the governance of the trust, violate Title VII of the 1964 Civil Rights Act, 42 U.S.C. Section 2000e and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

3. Does the removal in 1970 of a restriction against blacks being elected as trustees of a perpetual charitable trust of which blacks were beneficiaries, where the restriction was in force for 48 years, make constitutionally acceptable a scheme of trust governance totally dominated by all white trustees which was put in place and embodied in an Alabama decree in 1942 at the suit of the all white trustees?

4. Should the 1942 decree of an Alabama court obtained by the all white trustees of a perpetual charitable trust in order to establish a permanent scheme of trust governance which would insure white control no matter whether a then existing prohibition against blacks being trustees was removed or not, be set aside where the restrictions against blacks being eligible to be trustees has been removed, but the 1942 decree and the rules it approved are presently being used, by all the white co-trustees to insure their dominance of the government of the trust and the exclusion of blacks from any meaningful participation in the governance of the trust?

5. Should a court decree which is racially discriminatory on its face be set aside at the instance of blacks who are presently the objects of racial discrimination as the result of the decree?

PARTIES BELOW

Parties in the Supreme Court of Alabama were the petitioners Robert Bates, Gary L. Bradford, Robert M. Myers, James C. Frederick, Tommy Albright, William H. Hill, David J. Keeton, Nick Johnson and James Sloan; the Board of Operatives of the American Cast Iron Pipe Company and the John J. Eagan Trust; the Board of Management of the American Cast Iron Pipe Company and the John J. Eagan Trust; Paul W. Green, Leland C. Adams, Jr.; American Cast Iron Pipe Company, the John J. Eagan Charitable Trust; W. D. Moore; C. D. Barr; C. O. Hodges; J. J. Swenson; H. J. Noble; T. J. Reynolds; Eugene Sparkman; Earl Fox; Robert Nash; T. V. Vines; J. H. Brakefield; J. H. Ardis; J. W. Washburn; D. T. Hull; H. T. Lavender; F. D. Rogers; Kyle Hardin; Thurmun Streeter; Otis Ledbetter; James Whitehead; Frank Coupland; Henry Garret; Ed Loring; Aaron Harris; R. C. Gilly; Will Bettis; Frank Farlow; J. P. Doughty; Richard Bragdon; E. E. Langner; John M. Harbert, III; J. A. Bragan; William Eagan; W. E. Snow.

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No. 87-

In the

Supreme Court of the United States

October Term, 1987

The Board of Operatives of the
American Cast Iron Pipe Company
and the John J. Eagan Trust, et al,
Petitioners,

v.

The Board of Management of the
American Cast Iron Pipe Company
and the John J. Eagan Trust, et al,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE ALBAMA SUPREME COURT

Petitioners, the Board of Operatives of the American Cast Iron Pipe Company, one of the two trustees of the John J. Eagan charitable Trust, through nine of its twelve members, Robert Bates, Gary L. Bradford, Robert M. Myers, James C. Frederick, Tommy Albright, William H. Hill, David J. Keeton, Nick Johnson and James Sloan, pray that a writ of certiorari issue to review the judgment of the Supreme Court of Alabama.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama is printed as Appendix F.[1] The unreported opinion of the Circuit Court of Jefferson County, Alabama dated May 29, 1986, from which this appeal was originally taken is reprinted as Appendix E. The unreported decision of the Circuit Court of Jefferson County, Alabama dated April 6, 1942, is reprinted as Appendix B.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered September 18, 1987. The timely petition for rehearing by the petitioners, the Board of Operatives of the American Cast Iron Pipe Company and the John J. Eagan Trust, was denied by the Alabama Supreme Court on November 20, 1987 (Appendix G). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257.

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[1] The opinion of the Alabama Supreme Court decides four related consolidated cases. This petition for certiorari relates only to one of them, *Moore v. Hardin*,. The part of the decision pertaining to this case begins on p. F-55 of App. F. The other three cases involve appeals from denials of petitions for preliminary injunctions through which petitioners were attempting to prevent continuing abuses by the all white Board of Management.

STATUTES OR CONSTITUTIONAL PROVISIONS INVOLVED

Title VII of the 1964 Civil Rights Act, 42 U.S.C. Section 2000e and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution are set forth in Appendix H.

STATEMENT OF THE CASE

American Cast Iron Pipe Company (ACIPCO) is a Georgia corporation with its principal place of business in Jefferson County, Alabama. All of its outstanding shares were owned by its founder, John J. Eagan, prior to his death in 1924. Mr. Eagan, a devoted Christian, believed that it was possible for American industry to operate using and applying Christian principles, especially the Golden Rule. Therefore, Mr. Eagan created by a codicil to his will a perpetual charitable trust to own the stock of ACIPCO and to be controlled by ACIPCO employee trustees composed of both management and hourly wage employees. (App. A, pp .A-12 to A-17) The trust instrument directed that the charitable trust was to be operated for the benefit of the employees and the public using the products of ACIPCO in accordance with the Golden Rule and the teachings of Jesus Christ.[2]

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[2] This Court should review *Farlow v. Adams*, 474 So. 2d 53 (Ala. 1985), for a complete review and interpretation of this trust. This trust appears to be unique in American history. The direction to govern the trust affairs for the beneficiaries in accordance with the teachings of the Golden Rule certainly imposes a higher standard of care on the trustees than the general trust standard.

Mr. Eagan at the Christmas season of 1921 informed the white ACIPCO employees of his hopes for the governance of ACIPCO by Christian principles. (App. A, pp. A-18 to A-21) A group of ACIPCO foremen were asked by Mr. Eagan to develop a plan for establishing the Board of Operatives. Their plan provided for the Board of Operatives to consist of twelve white only hourly wage employees elected to the board periodically by vote of all the ACIPCO employees, both black and white, employed by ACIPCO for ninety days prior to any election. Members of the Board of Operatives were specifically limited to white, male, American citizens, more than twenty one years of age and who had been in the employ of ACIPCO for at least three years at the time of their election.[3] No one above the rank of shop foreman could be a member. The members of the Board of Operatives were to be elected by a majority of the eligible employees in the division of the plant each was to represent. (App. A, pp. A-22 to A-24).

This group of foremen also established a group called the "Directors of Colored YMCA" This group was vaguely defined, but was to be elected by the members of the "Colored YMCA" and was to have the same relationship to the "Colored YMCA" as the directors of the white YMCA had to it. Their plan also provided that this group "shall constitute a Board which the Board of Management or the Board of Operatives may call into conference on any matters affecting the interests

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[3] Mr. Eagan never made any reference to limiting the membership of the Board of Operatives to white employees, but he was aware that this was the foremens' plan since it was published two years before his death. He also never specified how the Board of Operatives would be elected.

of the colored employees." (App. A, p. A-24)

Sometime after Mr. Eagan's death in 1924, this black group was "remodeled" by the all white trustees in a document entitled "By-Laws of American Cast Iron Pipe Company." (App. A, pp. A-41 to A-42). It is not known when these "By-Laws" were adopted or by whom, except that they were adopted some time prior to April 1, 1942, when they were presented for court approval in the instant case of *Moore v. Hardin* , in the Circuit Court of Jefferson County, Alabama. The "new" name given to this group in these "By-Laws" was the "Negro Auxiliary Board."[4] These By-Laws provide that the Negro Auxiliary Board will be an "advisory" board to the Board of Management and Board of Operatives and will consist of 12 black employees elected from districts at ACIPCO by a majority of the black employees employed for six months.[5] Candidates for the Negro Auxiliary Board had to be black, male, at least twenty one years of age, an American citizen, and employed by the company for at least three continuous years.

The first Board of Operatives was elected in March,

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[4] The complaint in *Moore v. Hardin* states only that, "A set of by-laws for the American Cast Iron Pipe Company have been adopted. These by-laws formally make the Negro Auxiliary Board a part of the corporate set-up of American Cast Iron Pipe Company and carry into effect that portion of the plan prepared by Mr. Eagan." (App. A, pp. A-7 to A-8) This is a false statement as Mr. Eagan never proposed a separate group of black employees of any kind.

[5] These "By-Laws" approved by the Circuit Court of Jefferson County in 1942, required that the black employees voting for the black members of the Negro Auxiliary Board had to be employed twice as long as black and white employers voting for the members of the Board of Operatives.

1922. Mr. Eagan controlled ACIPCO until his death on March 30, 1924.

The John J. Eagan Charitable Trust was created by a codicil to Mr. Eagan's will dated April 3, 1923.(App. A, pp. A-12 to A-17) By the terms of this codicil, all 1085 outstanding shares of ACIPCO stock were devised to the members of the Board of Operatives and the Board of Management of the American Cast Iron Pipe Company, "jointly, and their successors in office as said boards, as trustees."

The provisions of that trust were described and interpreted by the Alabama Supreme Court in *Farlow v. Adams*, 474 So. 2d 53, 54, n. 1 (Ala. 1985) as follows:

> 1. The voting stock of Acipco was left in trust to the Board of Trustees composed of the Board of Operatives and the Board of Management.
> 2. The Board of Trustees was to do the following:
> (a) Receive dividends paid on the stock and use it, within their discretion, to insure a living wage to all employees.
> (b) Use the dividends, in their discretion, to aid employees and their wives and children in times of shutdown of the plant, illness, or unavoidable layoff of employees.
> (c) To vote the stock at stockholders meetings.
> (d) To be trustees for employees and persons requiring the product of the company. The codicil closes with this direction by Mr. Eagan:
> "The trustees, appointed by this codicil, in accepting the trust and acting hereunder will be trustees both for said employees and said persons requiring the product of said company. It is my will and desire that said trustees in the control of said company, through the control of said common stock,

> shall be guided by their sole purpose of so managing said company as to enable said American Cast Iron Pipe Company to deliver the company's product to persons, requiring it, at actual cost, which shall be considered the lowest possible price consistent with the maintenance and extension of the company's plant or plants and business and the payment of reasonable salaries and wages to all employees of said company, my object being to insure 'service' both to the purchasing public and to labor on the basis of the Golden Rule given by our Lord and Savior Jesus Christ."

In *Eagan v. Commissioner of Internal Revenue*, 43 F.2d 881 (5th Cir. 1930), the Eagan Trust was held to be a perpetual charitable trust.

On March 30, 1942, W. D. Moore, C. D. Barr, C. O. Hodges, J. J. Swenson, and H. J. Noble, as the all white Board of Management of ACIPCO and T. J. Reynolds, Eugene Sparkman, Earl Fox, Robert Nash, T. B. Vines, J. H. Brakefield, J. H. Ardis, J. W. Washburn, D. T. Hull, H. T. Lavender and F. D. Rogers, as the all white Board of Operatives (together the "Company Plaintiffs"), filed a "Bill of Complaint" in the Circuit Court of Jefferson County, Alabama. (App. A) This Bill of Complaint named as respondents Kyle Hardin, Thurman Streeter, Otis Ledbetter, James Whitehead, Frank Coupland, Henry Garrett, Ed Loring, Aaron Harris, R. C. Gilley, Will Bettis, Frank Roebuck and George Denney who were alleged to be "randomly selected" white and black Acipco employees. The Company Plaintiffs alleged that there were more than fifteen hundred employees of ACIPCO and that all of those employees could not be made respondents in the action with-

out *"great inconvenience . . .* and *great expense"* and without *"oppressive delays* being caused to the hearing of this cause."[6] (Emphasis supplied) (App. A, pp. A-2 to A-3)

This complaint is so egregiously misleading as to amount to a fraud on the court. The complaint states that Exhibit "A" attached thereto is a copy of Mr. Eagan's will and codicil. The language used in the complaint is, *"His* will and codicil to *his* will . . ." (Emphasis supplied) (App. A, pp. A-3 to A-4) In fact, the copy of the codicil attached to the complaint is not the codicil which Mr. Eagan wrote and signed, but contains language *changed* by a Georgia court after Mr. Eagan's death from that Mr. Eagan actually *wrote.* Yet, the codicil was presented to the Alabama courts in the complaint as though it had been written and signed by Mr. Eagan using that language.

Moreover, the written "testimony" of W. D. Moore, the president of Acipco and a party to that Georgia proceeding, was submitted to the court to establish Mr. Eagan's intent about the governance of ACIPCO and the trust, but that "testimony" never mentions that the language in the codicil had been changed. In fact, Moore's affidavit brazenly states that Exhibit "A" to the complaint is a "true and correct copy of

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[6] These allegations are mere conclusions. The complaint does not state who selected these men as representatives, how the selection was made or why these particular men were adequate representatives of the other fifteen hundred employees. The complaint does state that it would be a problem to name the other employees as parties, but gives no reason why the other employees could not be given reasonable notice of the action so they could intervene if they chose. No other notice or opportunity to intervene was in fact given. Only eight days elapsed between the date of filing the complaint and the final decree in the case.

the will and codicil of John J. Eagan."

The codicil as presented by the complaint in this case to the Alabama court reads in the paragraph in question, as follows:

> It is my will and desire, and I direct that in determining all questions as to voting said stock and as to carrying out the provisions of the trust created by this codicil, the members of the Board of Management, as trustees, shall vote as a unit, and the members of the Board of Operatives, as trustees, shall vote as a unit, the vote of each group to be determined by the majority vote of the members of the respective boards; and that in the event of the failure of the respective groups of trustees to agree upon any question, said question in dispute shall be referred to the Board of *Directors*, whose decision on said question in dispute shall be final. (Emphasis supplied) (App. A, p. A-15)

The word *"Directors"* as italicized above did not appear in Mr. Eagan's original handwritten codicil, he used the word- *"Trustees"*. The petitioners take the position that Mr. Eagan intended by the use of the word *"Trustees"* that in the event of a tie vote, the Board of Operatives and the Board of Management would cease functioning as "units" and the twelve members of the Board of Operatives and the members of the Board of Management, as members of the Board of Trustees would

individually cast one vote each to decide the issue in dispute.[7] The change of the word *"trustees"* to the word *"directors"* has made it possible for the Board of Management to dominate and absolutely control ACIPCO and the trust because of its control of the Board of Directors of ACIPCO. All split votes in the history of ACIPCO have been decided by the Board of Directors in favor of the Board of Management.

The Georgia "case" which changed the language is styled *Mrs. Susan Young Eagan and Marion M. Jackson, As Executors of the Last Will and Testament of John J. Eagan, Deceased v. W. D. Moore, et al., As Trustees, et al.* The entire record in that case from the Georgia court is Appendix I to this petition. The "defendants" in the 1924 Georgia case are designated as defendants in the dual capacity of trustees and employee representatives. (App. I, pp. I-1; I-2; I-24; I-35 to I-36) Since it is undisputed that there were no black trustees in 1924, it is clear that no black employees of ACIPCO were made defendants in the 1924 Georgia case, yet the case purports to be binding on all present and all future employees of ACIPCO. (App. I, pp. I-1; I-2; I-24; I-35 to I-36) No notice was given other employees.

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[7] Management throughout this litigation has taken the position that Mr. Eagan could not have intended this result as this would mean that the Operatives could simply out vote Management if the matter were submitted to a vote of the individual members of the Board of Trustees and that the ACIPCO Board of Directors would lose control of the corporation. This assumes that all of the members of the Board of Operatives would vote together, a claim contrary to the current split in the Board of Operatives. Even if true, however, Management's argument would be irrelevant since the Board of Directors of Acipco as the governing body only of the res of the trust would ordinarily be subordinate to the trustees of the trust owning the stock of the corporation.

The so-called "defendants" agreed that the language of the codicil should be changed from *"Trustees"* to *"Directors"* by a vote of the all white Board of Trustees before the Georgia "case" was even filed. (App I, pp.I-26 to I-29) The "defendants" also agreed to the correctness of the requested change in the pleadings. (App. I, p. I-23) The all white Management control of ACIPCO and the Eagan Trust was assured by this decision no matter whether blacks were ever thereafter elected to the Board of Operatives or not.

The complaint in the instant case states the belief of the Company Plaintiffs that regulations need to be adopted to govern the trustees and, after reciting the "history" of the Eagan Trust,[8] seeks court approval of a set of such regulations attached to the complaint and *already approved by the all white Company Plaintiffs.* (App. A, pp. A-28 to A-40) Section eight asks the court to rule on whether the trustees have the right to adopt rules *to govern their conduct and that of their successors* and asks the court to *approve* the rules *already adopted.* (App. A, pp. A-8 to A-10) The bill of complaint, however, does not even suggest that the trustees doubt whether they have the authority to adopt these rules on their own without court approval. Nor is there any hint or suggestion that there is any ambiguity in the trust instrument or other need to interpret it. It is clear

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[8] No mention was made in this "historical" section of the complaint of the change in the language of Mr. Eagan's codicil by the Georgia court, though it is stated that the trustees are performing their duties in accordance with Mr. Eagan's "intentions." It is obvious that the trustees did not want it known that Mr. Eagan's original language had been changed.

that the only thing the all white trustees are seeking in this case is the protection of a decree of the court for their plan to freeze the all white control of ACIPCO and the trust in perpetuity.[9]

Moreover, the all white trustees clearly wanted to make their control perpetual. Therefore, the decree issued by the 1942 court provides that its decision and the rules it approves will be binding on all successor trustees. (App. B, p. B-9)

A review of the complaint and the answer makes it clear that there was no bona fide dispute in the "case" and that it was a collusive proceeding merely designed to get the imprimatur of a court order on Management's control of the trust and ACIPCO. On April 2, 1942, two days after the filing

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[9] This is made even more clear by the fact that the trustees reserve the right to change or substitute in whole or in part, new rules for the rules approved by the court and to make changes in such a manner that whenever the all white Board of Management and the ACIPCO Board of Directors agree to such changes they can be made regardless of the position of the Board of Operatives. This critical provision reads as follows:

> "These rules and regulations shall be submitted to the Circuit Court of the Tenth Judicial Circuit of Alabama, Chancery Division, for approval, and when approved by decree of said court, shallnot be amended, altered, or changed, except by affirmative vote of the two units composing this Board of Trustees, except that they may be amended, altered, or changed in case of a division in the vote of the two units by submitting the disputed question to the Board of Directors and then submitting any changes approved by the Board of Directors and one only of the two Boards to the court having jurisdiction over this trust for approval or rejection, which court is at the present time the Chancery Division of the Circuit Court of the Tenth Judicial Circuit of Alabama." (App. A, p. A-50)

Thus, any time the all white Board of Management wants to change the rules it can do so, with or without the consent of the racially integrated Board of Operatives. The Operatives have no such power.

of this "Bill of Complaint", an "answer" was filed by Smyer & Smyer as solicitors for respondents. This "answer" does not deny one single allegation of the complaint, but instead admits the allegations of sections one through five and neither admits or denies the allegations of six and seven. The "answer" further states that the respondents join in the averments of section eight in requesting instructions from the court as to whether the proposed "rules and regulations" were "proper rules and regulations for the management and conduct of said trustees."

An "Acceptance of Service" dated April 2, 1942, but not filed until April 7, 1942, was purportedly signed by all of the respondents named in the Bill of Complaint. Part of that acceptance of service states that the respondents waive any further notice of filing of the complaint and "do agree that said case may be heard immediately."[10]

On April 6, 1942, the written "testimony" of the ubiquitous ACIPCO president, W. D. Moore, and four other people was "published by order of the court". This "testimony" consists of nothing more than conclusory statements to the effect that the rules and regulations are proper and necessary.

On the same day this testimony was "published", April

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[10] The only one of the "respondents" that the petitioners have been able to locate is James Whitehead, a black man. His affidavit is Appendix D. Mr. Whitehead identified his signature on the "acceptance of service", but stated in his affidavit that he did not know anything about a lawsuit, but was told by ACIPCO officials that he was only signing a document that stated he agreed with Mr. Eagan's plan to govern ACIPCO and that he signed it as a condition of getting a job in the YMCA office and out of the common labor force. (App. D)

6, 1942, the final decree of the court was signed by the judge. This was four days after the alleged date the respondents' signed the "acceptance of service," but the day before that "acceptance of service" was filed in court. The respondents' answer and the written testimony of the five persons named above were filed on the same day the final decree was issued, April 6, 1942. Thus, the entire proceeding from the initial filing until the final disposition was only eight days.[11]

The "Decree of the Court" simply repeats the language of the Bill of Complaint.[12] The "Decree of the Court" finds as a fact that all of the allegations of the "Bill of Complaint" are true and finds the trustees have the power to make rules and regulations to govern themselves *and subsequent trustees* and approves the submitted rules and regulations.[13] This decree is now used on a regular basis by the Board of Management to frustrate the Board of Operatives in any effort to participate in any meaningful way in the governance of the trust or the

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[11] The petitioners have photocopied the entire court file in this case and sent it to the Supreme Court clerk so that the documents themselves can be physically observed since the proper sense of fraud cannot be conveyed by retyping the documents.

[12] This court can compare the typewriting of the complaint and that of the court decree and see that both documents were typed on the same typewriter.

[13] The "Decree of the Court" makes no reference to the Georgia court action amending the codicil of Mr. Eagan as it had never been brought to the attention of the court and the court clearly believed the codicil presented to it was as Mr. Eagan wrote it.

management of ACIPCO.[14]

"From 1922 until January, 1970, the membership of the Board of Operatives was explicitly limited to 'white' employees, blacks were relegated to "Negro Auxiliary Board." *Pettway v. American Cast Iron Pipe Company*, 576 F.2d at 1165 (5th Cir. 1978). In 1970, the United States District Court of the Northern District of Alabama ordered the integration of the Board of Operatives and the abolition of the all black Negro Auxiliary Board. *Pettway v. American Cast Iron Pipe Company*, 332 F.Supp. 811 (N.D. 1970) *aff'd*. 494 F.2d 211, 264-67 (5th Cir. 1974).

ACIPCO and the Eagan Trust has been under the absolute control of the all white Board of Management as a result of and through the means provided by the *Eagan v. Moore* and *Moore v. Hardin* decisions. It is clear from the record that the all white Management of ACIPCO obtained these court decrees without proper notice to and participation by the ACIPCO employee beneficiaries and with the cooperation of trustees from which blacks were excluded. Management has continued since 1942 to engage in racially discriminatory conduct. No black person has ever been a member of the Board

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[14] The Board of Management continues at the time of filing of this petition to use the rules and regulations approved by this court proceeding and to insist that the Board of Operatives is today bound by the 1942 decision. An example is *Ex parte Nick Johnson*, 481 So.2d 353 (Ala. 1985), where the Alabama Supreme Court held that the Board of Operatives was at least entitled to notice when the Board of Management invoked the action of the circuit court in referring disputed matters to the ACIPCO Board of Directors. It is, therefore, inaccurate to refer to this decision as though it were a decree entered 45 years ago and left to gather dust.

of Management. There has been in the past and continues to be a pattern of racial discrimination at ACIPCO made possible in part by the 1942 *Moore v. Hardin* decision which enshrined the racially discriminatory management system. The major case in this regard is *Pettway v. American Cast Iron Pipe Company,* 332 F. Supp. 811 (N.D. Ala. 1970) and 578 F.2d 1157 (5th Cir. 1978), *reh. denied* 581 F.2d 267, *cert. denied,* 439 U.S. 1115, 99 S.Ct. 1020, 59 L.Ed. 2d 74, *appeal after remand,* 681 F.2d 1259 and 721 F.2d 315, *cert. denied Daniel v. Pettway,* 467 U.S. 1243, 104 S. Ct. 3515, 82 L.Ed. 2d 824, *cert. dismissed* 467 U.S. 1247, 104 S.Ct. 3526, 82 L.Ed. 2d 833. See also *Pettway v. American Cast Iron Pipe Company,* 494 F.2d 211 (5th Cir. 1974). Others are *Wrenn v. American Cast Iron Pipe Co.,* 575 F. 2d 544 (5th Cir. 1978) and *Keenan v. American Cast Iron Pipe Co.,* 707 F. 2d 1274 (11th Cir. 1983). There have also been other racial discrimination cases decided by the United States District Court for the Northern District of Alabama and not appealed.

Beginning in the late 1970's and early 1980's the now racially mixed Board of Operatives began for the first time in the history of ACIPCO to insist on participation in the management and control of the Eagan Trust and ACIPCO and to try "to establish a stronger voice in company decisions."[15] *Farlow v. Adams,* 474 So.2d at 55 (Ala. 1985). Management has consistently used these two decisions to frustate these efforts and to

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[15] The membership of the Board of Operatives since 1981 has been composed of five blacks and seven whites. The petitioners are composed of four blacks and five whites.

further consolidate its power. Management and the ACIPCO Board of Directors retaliated against the racially integrated Board of Operatives in 1983 for these efforts by firing the entire membership of the Board of Operatives from their jobs at ACIPCO and removing them from the Board of Operatives.

The members of the Board of Operatives were restored to their jobs and their membership on the Board of Operatives by the Alabama courts. The Alabama Supreme Court specifically held that the firing was in retaliation for the Board of Operatives' efforts as trustees to correct abuses of the trust:

> Here, however, the Operatives were not fired because of a violation of a plant rule, but because of their efforts as trustees of the Eagan Trust to correct what they considered was a wrongful use of ACIPCO funds and their diversion from the beneficiaries of the trust.

Farlow v. Adams, 474 So. 2d at 57.

One of the rules and regulations approved by the 1942 court has been crucial to the absolute control by Management and is frequently used at present by Management to frustrate the efforts of petitioners to oppose oppressive management policies, including racially oppressive policies. That rule reads as follows:

> In the event the two units of the Board of Trustees shall fail to agree upon any question, the said question in dispute may be referred to the Board of Directors, whose decision on said question in dispute shall be final.
>
> Either the Board of Management or the Board of Operatives may direct the Secretary of the Board of

> Trustees to refer said question to the Board of Directors. The Secretary shall make such reference in writing. Any meeting of the members of the Board of Directors held for the purpose of deciding a question in dispute between the two units shall be presided over by an attorney authorized to practice law in Birmingham, Alabama, who is not a member of either the Board of Operatives or the Board of Management. Such presiding officer shall be paid a reasonable fee for his services. He shall be appointed by the presiding judge of the court having jurisdiction over this trust, which court is at the present the Circuit Court of the Tenth Judicial Circuit of Alabama." (App. A, pp. A-47 to A-48)

The Board of Management has continually invoked this procedure to defeat and frustrate all efforts by the Board of Operatives to resist the Board of Management since the Board of Operatives has begun to insist on its proper role as trustees. Petitions have been filed by Management to invoke the circuit court's appointment of a lawyer to preside over the ACIPCO Board of Directors while it voted on a disputed question in every year since 1985. (See *Ex parte Nick Johnson, supra.*) Such a motion is, in fact, pending at this writing before that court to make another such appointment so the Board of Directors can once again vote in Managements' favor.

All of these matters were presented to the Circuit Court of Jefferson County, Alabama by the petitioners in their Rule 60, Alabama Rules of Civil Procedure, motion. (App. C) On May 29, 1986, the trial court entered an order entitled, "Order Denying Preliminary Injunction On The Merits" though it was

in reality a final order from the denial of petitioners' motion under Rule 60.[16]

The trial court refused to set aside the 1942 decision and realign the Board of Operatives as a defendant so all of these matters could be properly tried by the court, even though the trial court agreed that the 1942 decision was violative of the 1964 Civil Rights Act and the United States Constitution. The trial court held that the decision in *Pettway v. American Cast Iron Pipe Company*, supra, had eliminated the Negro Auxiliary Board, made blacks eligible for election as members of the Board of Operatives, and contained provisions for the restructuring of the electoral districts from which the members of the Board of Operatives were to be elected. The trial court apparently believed that it was not necessary under the law to also remove the permanent discriminatory management arrangements that had been created under the discriminatory system and which in practice since *Pettway* have made the changes mandated by *Pettway* largely meaningless. (App. E, pp. E-5 to E-7)

The Operatives appealed to the Supreme Court of Alabama. The case was consolidated on appeal with three related appeals from denials of preliminary injunctive relief filed by the Board of Operatives against the Board of Management. The Supreme Court of Alabama denied the Operatives' Rule 60 motion, adopting the opinion of the trial court almost

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[16] The Alabama Supreme Court treated this May 29, 1986, order as a final order for purposes of appeal. (App. F, p. F-59).

verbatim. (App. F, pp.F-70 to F-72)

The Federal Questions Sought To Be Reviewed Here Were Timely And Properly Raised Before The Trial And Appellate Courts Below

Petitioners raised in the trial court the federal questions which they seek to review. The petitioner's motion under Rule 60 contained the following allegation:

> 8. The movants aver that the final decree of the Court [in 1942] is void because:
> (a) The Court had no jurisdiction;
> (b) The Court acted in violation of the United States Constitution in judicially enforcing a racially discriminatory scheme of trust management and control and the decree should be set aside in accordance with the principles established in *Shelly v. Kramer*, 334 U.S. 1, 92 L. Ed. 1161, 68 S. Ct. 836 (1948); *Evans v. Abney*, 396 U.S. 435, 24 L. Ed. 634, 90 S.Ct. 628 (1970); *Pettway v. American Cast Iron Pipe Company*, 494 F.2d 211 (5th Cir. 1974), *reh. den.* 494 F.2d 1296, *app. after remand* 578 F. 2d 11157, *reh. den.* 581 R. 267, *cert. den.* 439 U.S. 1115, *app. after remand* 681 F. 2d 1259 F. 2d 315, *cert. den.* 104 S. Ct. 3515 (*Daniel v. Pettway*), *cert. dismissed* 104 S. Ct. 3526; . . .
> (e) The proceedings in the case were so devoid of compliance with the fundamental requirements of procedural and/or substantive due process of law as to render the final decree based on those proceedings void.[17]

[17] Petitioner's Motion Under Rule 60, "Alabama Rules of Civil Procedure For Relief From Judgment and to Declare Judgment Void and For Preliminary Injunction" at paragraph 8. (Appendix C)

The trial court rejected petitioners' contention that the 1942 decision enforced a racially discriminatory scheme of trust management and control in violation of the United States Constitution and should be set aside.

This federal issue was raised again by petitioners in the Supreme Court of Alabama which adopted verbatim the opinion of the trial court after stating, "The Operatives also attempted to have the 1942 judgement set aside because, at that time, the trust was racially discriminatory. We find the reasoning of the trial court on this issue to be correct and herewith adopt that portion the the trial court's order. . ." (Appendix F p. F-70)

Reasons the Writ Should Be Granted

The Alabama Supreme Court has decided a federal question in a way which conflicts with applicable decisions of this Court. Simply stated, the Alabama Supreme Court refused to set aside a court decree which made possible a permanently racially discriminatory scheme of trust government where the court decree had been obtained at the instance of white trustees from which blacks were explicitly excluded. The Alabama Supreme Court held that such a scheme may survive if blacks are later allowed to become trustees, even though the permanent trust management scheme denies the racially integrated trustees the power to change in any way the racially discriminatory scheme of trust government, while allowing

the still all white co-trustee to make such changes as it desires. The scheme for trust governance established and protected by the court decree is violative of the 1964 Civil Rights Act (42 U.S.C. 2000e) and the Equal Protection Clause of the United states Constitution.

In 1924 and in 1942 the all white trustees obtained two court decrees which locked in all white control of the trust whether blacks subsequently became trustees or not. It is true that following the *Pettway* decision in 1970 blacks became eligible to run for and were elected to the Board of Operatives. Some blacks have been elected and now serve as members of the Board of Operatives. But, all disputes are decided by the ACIPCO Board of Directors"; a board which the Supreme Court of Alabama has found to be "dominated and controlled by the [all-white] Board of Management," *Farlow v. Adams*, 473 So.2d at 58 (Ala. 1985).[18]

This structure of trust governance places absolute power in the hands of the all-white Board of Management and leaves the post-1970 racially integrated Board of Operatives with no real power. The result is that the racial discrimination which permeated the operation of the Eagan Trust prior to 1970 has "locked in" permanent, all white control because of the inability of the racially integrated Board of Operatives to take

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[18] The Board of Operatives under the rules approved in the 1942 decision is allowed to elect only two of the 13 ACIPCO directors. In recent years it has elected one of its two directors from among the black members of the Board of Operatives. (App. A, pp. A-47 to A-50) These black directors are the only blacks to ever serve on the ACIPCO Board of Directors.

any action the all white Board of Management does not accept. Such a "locking in" or a "freezing" of prior discriminatory practices has been held by this Court to violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Title VII of the 1964 Civil Rights Act.

This Court stated in *Teamsters v. United States*, 431 U.S. 324, 52 L.Ed. 2d 396, 97 S.Ct. 1983 (1977):

> One kind of practice "fair in form, but discriminatory in operation" is that which perpetuates the effects of prior discrimination. As the Court held in *Griggs*: [v. *Duke Power Co.*, 401 U.S. 424] "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices."

This Court in *Teamsters* cited the case of *Asbestos Workers Local 53 v. Volger*, 407 F.2d 1047 (5th Cir. 1969), as an example of such a practice or procedure which, though neutral on its face, operated to "freeze" the status quo of prior discrimination. This Court described the facts of *Asbestos Workers* as follows:

> A union had a policy of excluding persons not related to present members by blood or marriage. When in 1966 suit was brought to challenge this policy, all of the union's members were white, largely as a result of pre-Act, intentional racial discrimination. The court observed: "While the nepotism requirement is applicable to black and white alike and is not on its face discriminatory, in a completely white union the present effect of its continued application is to forever deny to Negroes and Mexican-Americans any real opportunity for

membership." id., at 1054. (431 U.S. at 35 n. 32)

Hunter v. Underwood, 471 U.S. 222, 85 L.Ed. 2d 222, 105 S.Ct. 1916 (1985), was a challenge to Article VIII, Section 182, Alabama Constitution of 1901, which provided for the disenfranchisement of persons convicted of, among other offenses, "any crime . . . involving moral turpitude." This Court observed that Section 182 was racially neutral on its face but had a discriminatory impact. This Court observed that the typical problem of proving racial motivation behind passage of an act was not presented in this case because of ample evidence that the Alabama Constitutional Convention of 1901 was permeated with a "zeal for white supremacy [which] ran rampant at the convention." 471 U.S. at 229.

The appellants in *Hunter*, (the voter registrars), in arguing that Section 182 did not violate the Equal Protection Clause, contended that:

> [R]regardless of the original purposes of Section 182, events occurring in the succeeding 80- years had legitimated the provision. Some of the more blatantly discriminatory sections, such as assault and battery on the whites and miscegenation, have been struck down by the courts, and appellants contend that the remaining crimes — felonies and moral turpitude misdemeanors — are acceptable bases for denying the franchise. 471 U.S. at 233.

This Court rejected that argument stating:

> Without deciding whether Section 182 would be valid if enacted today without any impermissible

> motivation, we simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect. As such, it violates equal protection under *Arlington Heights* [v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 50 L.Ed. 2d 450, 97 S.Ct. 555 (1977)] (471 U.S. at 231)

In *Bazemore v. Friday*, 478 U.S. ___, 92 L. Ed. 2d 315, 106 S. Ct. 3000 (1986), this court considered whether the North Carolina Extension Service had a duty to eradicate salary disparities between black and white workers that had their origin prior to the date when Title VII was made applicable to public employees. The facts were that before the black and white Extension Service branches were merged in 1965, the Extension Service maintained two separate, racially segregated branches and paid black employees less than white employees. Some of these pre-existing salary disparities continued to linger on after the merger of the Extension Service and after Title VII became applicable to the Extension Service in 1972. The Extension Service made some adjustments, but not all the adjustments necessary to get rid of all such disparities. The court of appeals held that the Extension Service was under no obligation to eliminate any salary disparity that had its origin prior to Title VII becoming effective as to public employees. This Court reversed, saying:

> The error of the Court of Appeals with respect to salary disparities created prior to 1972 and perpetuated thereafter is too obvious to warrant extended discussion: that the Extension Service dis-

criminated with respect to salaries prior to the time it was covered by Title VII does not excuse perpetuating that discrimination after the Extension Service became covered by Title VII. To hold otherwise would have the effect of exempting from liability those who were historically the greatest offenders of the rights of blacks. A pattern or practice that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date, and to the extent an employer continued to engage in that act or practice he is liable under that statute. While recovery may not be permitted for pre-1972 acts of discrimination, to the extent that this discrimination was perpetuated after 1972, liability may be imposed.

Each week's pay check that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII. The Court of Appeals plainly erred in holding that the pre-Act discriminatory difference in salaries did not have to be eliminated.
(92 L.Ed. 2d at 328)

Just as each pay check in *Bazemore* is a new wrong actionable under Title VII, likewise each time the Board of Management uses the rules established in the 1942 decision to perpetuate its control over the Eagan Trust, a new and actionable wrong occurs under Title VII.

This court held in *Gilmore v. City of Montgomery*, 417 U.S. 556, 412 L.Ed. 2d 304, 94 S.Ct. 2416 (1974) that Montgomery was "under an affirmative constitutional duty to eliminate every 'custom, practice, policy or usage' reflecting an 'impermissible obeisance to the now thoroughly discredited doctrine of

"separate but equal, '" and that, "This obviously meant that discriminatory practices [in Montgomery public facilities] were to be eliminated 'root and branch'..." (41 L.Ed. 2d at 315). The question before this Court in Gilmore was whether allowing all white private school groups to use public facilities would contravene the school desegregation orders and policies. This Court said that any use of these public facilities which constituted even "a vestige" of public racial segregation would be struck down as violative of the orders and policies prohibiting such segregation. (41 L.Ed. 2d at 318)

The word "vestige" is derived from the Latin word "vestigium" meaning "a footprint". The more current use of the word is to refer to a trace or mark of something which once existed, but has now passed away. The current rules governing the Eagan Trust are the enduring mark of the racially discriminatory system which alone made them possible. The 1942 decision of the circuit court in this case is the bastion which protects these rules from review. It was created at the instance of the all white Board of Trustees for just this purpose and must be set aside because it reeks of racial bias and prejudice.

The Circuit Court of Jefferson County held in the language adopted by the Alabama Supreme Court that even though the "rules and regulations" approved by the court in 1942 were "found to be in violation of the 1964 Civil rights Act and ... the Constitution", that the decision in *Pettway* making blacks eligible to be elected to the Board of Operatives and abolishing the "Negro Auxiliary Board" cured the defects

resulting from the 1942 decision. The language stated:

> "It is not for this Court at this time to conclude that this Court's decree rendered in 1942 interpreting the plan is invalid *because racial restrictions since removed were left in place in 1942.*" (Emphasis supplied) (App. E, p. E-7)

The use of this language makes it clear that neither the circuit court or the Alabama Supreme Court understood that the 1942 decision governs the Eagan Trust in perpetuity and freezes in place the all white control mechanisms. It is only since the Board of Operatives has been racially integrated and has tried to take its place as a trustee, that any test of the racially controlled trust management system has come about. The system is one of permanent rules of governance making black participation in the act of governance meaningless. Thus, when the Alabama courts refer to "racial restrictions since removed," they miss the point entirely. The decisions of the circuit court and the Supreme Court of Alabama prevent blacks from freeing the Eagan Trust of the shackles and vestiges of prior racial discrimination, or even of having any chance to do so. The "rules and regulations" for the operation of the Eagan Trust which were approved in the 1942 decree leave the black employees of ACIPCO subject to the absolute power of a Board of Directors dominated and controlled by the all-white Board of Management.

On the other hand, if the 1942 decree was to be set aside and the Board of Operatives realigned as a defendant, then a truly adversary proceeding could be had to determine what

racially non-discriminatory rules and regulations should govern the Board of Trustees and ACIPCO. Such questions as whether the doctrine of *cy pres* should be applied and whether the trust is being administered contrary to Mr. Eagan's intent could be decided based on real evidence. In short, a real answer could be filed to the 1942 complaint denying its allegations and a real trial of the issues could be had.

CONCLUSION

The racially integrated Board of Operatives sought by its motion under Rule 60 to achieve a racially level playing field so that now that blacks have finally gotten in the game they can have the chance to play in a meaningful manner. Otherwise, the fact that blacks finally got in a game where the rules had all been made by whites permanently against them makes their victory a hollow one indeed. The vestiges of racism inherent in the "rules and regulations" for the operation of the Eagan Trust adopted by the all-white Trustees in 1942 and approved by the 1942 court at their request have "frozen" or "locked-in" all white control. In refusing to set aside the 1942 decision approving these "rules and regulations," the Supreme Court of Alabama has condemned the present and future black employee-beneficiaries of the Eagan Trust to dominance by a self-perpetuating, all-white oligarchy. The petition for a writ of certiorari should be granted.

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CERTIFICATE OF SERVICE

I do hereby certify that I have served a copy of the foregoing on all counsel of record by placing a copy of same in the United States Mail, postage prepaid and properly addressed on this the 18 day of February, 1988.

Of Counsel

APPENDIX

APPENDIX A

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA, IN EQUITY.

W. D. Moore, C. D. Barr, C. O. Hodges, J. J. Swenson, and H. J. Noble, constituting the Board of Management of American Cast Iron Pipe Company, a corporation; and T. J. Reynolds, Eugene Sparkman, Early Fox, Robert Nash, T. V. Vines J. H. Brakefield, J. H. Ardis, J. W. Washburn, D. T. Hull, H. T. Lavender, and F. D. Rogers, constituting the Board of Operatives of American Cast Iron Pipe Company, a corporation; and together constituting the Board of Trustees under the codicil to the will of John J. Eagan,deceased, Complainants,	)	No. 53715
VERSUS	)	
Kyle Hardin, Thermun Streeter, Otis Ledbetter, James Whitehead, Frank Coupland, Henry Garret, Ed Loring, Aaron Harris, R. C. Gilly, Will Bettis, Frank Roebuck, and George Denny, Respondents.	)	

TO THE HONORABLE JUDGES OF SAID COURT:

Your complainants, as a basis for the relief hereinafter prayed for, how unto your Honors as follows:

I.

Your complainants, T. J. Reynolds, Eugene Sparkman, Earl Fox, Robert Nash, T. V. Vines, J. H. Brakefield, J. H. Ardis, J. W. Washburn, D. T. Hull, H. T. Lavender, and F. D. Rogers, are the sole members of the Board of Operatives of American Cast Iron Pipe Company, a corporation organized under the laws of the State of Georgia and having a place of business in the County of Jefferson, State of Alabama, said Board of Operatives consisting of twelve members, but there being at the present time one vacancy; and your complainants, W. D. Moore, C. D. Barr, C. O. Hodges, J. J. Swenson, and H. J. Noble, are the sole members of the Board of Management of said corporation. Each of your complainants is over the age of twenty-one years and resides in Jefferson County, Alabama.

II.

The respondents, Kyle Hardin, Thermun Streeter, Otis Ledbetter, James Whitehead, Frank Coupland, Henry Garret, Ed Loring, Aaron Harris, R. C. Gilly, Will Bettis, Frank Roebuck, and George Denny, are each over the age of twenty-one years and reside in Jefferson County, Alabama. They are each of them employees of the American Cast Iron Pipe Company and are employed at the plant of said corporation located in Jefferson County, Alabama, at which plant said Company is engaged in the manufacture of cast iron pipe. Some of them are white employees and some of them are colored employees,

and some of the respondents are employed in each of the various departments of the American Cast Iron Pipe Company.

There are more than fifteen hundred employees of American Cast Iron Pipe Company and all of said employees cannot be made respondents in this cause without great inconvenience, without great expense, and without oppressive delays being caused to the hearing of this cause should all of said employees be made parties hereto and brought before this court. The interest of all and each of said employees of the American Cast Iron Pipe Company in the subject matter of this suit is the same, and the failure to make other employees parties to this cause will not adversely affect any of the rights of any of said employees as such employees if a proper representation of employees be made parties hereto.

III.

Your complainants, constituting the entire membership of said Board of Operatives and Board of Management of American Cast Iron Pipe Company, are the duly constituted trustees under and by virtue of the terms of the codicil to the will of John J. Eagan, deceased. John J. Eagan died on March 30, 1924. At the same time of his death he was a resident of the State of Georgia. His will and the codicil to his will were duly probated in the Ordinary's Court of DeKalb County, Georgia. Copies of said will and of said codicil are attached hereto, marked Exhibit A, and are made fully a part hereof. Under any

virtue of the terms of said codicil, one thousand eighty-five (1,085) shares of the common stock of American Cast Iron Pipe Company, which number of shares is the entire outstanding issue of shares of common stock of said corporation, constitute the res of the trust held by your complainants as such trustees for the purposes set forth in the codicil hereto as Exhibit A.

IV

Your complainants as such trustees have accepted said trust, have taken possession of sa[illegible] shares of common stock, have actively functioned as such trustees, and are now actively functioning as such trustees in the management of said trust.

V

Your complainants further aver that the Board of Management and the Board of Operatives of the American Cast Iron Pipe Company were created at the suggestion of and under the direction of John J. Eagan prior to his death. The plan for the creation of said Boards was outlined by Mr. Eagan, who at the time owned the entire issue of the common capital stock of American Cast Iron Pipe Company and through ownership of the stock dominated and controlled its affairs, to the employees of the said American Cast Iron Pipe Company at the Christmas Season of 1921. A copy of an account of said speech, which has been made a part of the permanent records of the Company, is attached hereto and made fully a part hereof and

marked Exhibit B. Following this statement by Mr. Eagan, a written outline of the plan suggested by Mr. Eagan was submitted to the employees of said corporation for their approval. A copy of said written outline of a plan is hereto attached, made fully a part hereof, and marked Exhibit C. There is also hereto attached, made fully a part hereof, and marked Exhibit D, a copy of a letter signed by John J. Eagan and directed to the Board of Management and Board of Operatives, dated April 22, 1922. This plan was accepted by the employees, and the first members of the Board of Operatives, totaling twelve in number, were elected in May, 1922, and adopted rules and regulations for said Board, copy of which is hereto attached, made fully a part hereof, and marked Exhibit E. The members of such Board of Operatives were selected from the white personnel of the American Cast Iron Pipe Company by a vote of all of the employees, and in pursuance of the plan of Mr. Eagan two of the members of the Board of Operatives were elected to the Board of Directors of American Cast Iron Pipe Company. This procedure has been followed from that date until the present time. At the same time that the members of the Board of Operatives were elected, an equal number of members of a Board of Directors for the colored Y. M. C. A. was elected from the negro personnel fo the American Cast Iron Pipe Company. The name fo this Board of Directors of the colored Y. M. C. A. was later changed to the Negro Auxiliary Board to the Board of Operatives. It has continued to be selected and to function in accordance with the plan proposed by Mr. Eagan from that time to the present date. Under the

plan proposed by Mr. John J. Eagan, which plan was put into effect, the Board of Management was created, consisting of five members, namely the President, the Vice President, the Works Manager, the Sales Manager, and the Treasurer. Under the plan proposed and put into effect by Mr. Eagan, each member of the Board fo Management was elected as a Director of the Company, and this plan has been continuously followed to the present time. These two Boards proposed by and set up by Mr. Eagan functioned up until the time of the death of Mr. Eagan as a part of the corporate set-up of the American Cast Iron Pipe Company, and have continued to so function since his death. Your complainants further aver that it was a part of the plan of Mr. Eagan that there should be elected the the Board of Directors of the American Cast Iron Pipe Company the members of the Board of Management of the Company, two members of the Board of Operatives of the Company, one member of the clerical forces fo the Company, one member at large from the Company organization, and three members not stockholders of the Company and not connected with the Company organization — one representing the interest of the buying public, one the preferred stockholders or invested capital, and one representing the religious, social, and educational life of the country.

VI

Following the death of John J. Eagan, the Board of Management and the Board of Trustees entered upon the perform-

ance of their duties as trustees under the will of John J. Eagan. They have continuously performed such duties since that time and have continued the plan outlined by Mr. Eagan in January, 1922, and have performed their duties as trustees in accordance with their understanding of the intention of Mr. John J. Eagan when he created said trust. In performance of such duties they have elected to membership on the Board of Directors of the American Cast Iron Pipe Company, each year at its annual stockholders' meeting, the five members of the Board of Management, two members from the Board of Operatives, one member from the clerical forces of the Company, one member at large from the Company organization, and three members not connected with the Company organization - one representing the interest of they buying public, one the preferred stockholders or invested capital, and one representing the religious, social, and educational life of the country. The only variation from this plan has been that an additional director was elected to the Board of Directors. This was due to the fact that a former Works Manager retired from that position but remained as an employee of the Company. It was desired that he remain a member of the Board of Directors in order that his intimate knowledge of the affairs of the Company be made available to the Board of Directors. A set of by-laws for the American Cast Iron Pipe Company have been adopted. These by-laws formally make the Board of Management, the Board of Operatives, and the Negro Auxiliary Board a part of the corporate set-up of American Cast Iron Pipe Company and carry into effect that portion of the plan pro-

posed by Mr. Eagan. A copy of the by-laws is attached and marked Exhibit F and made fully a part hereof.

VII

The number of trustees under the will of John J. Eagan is comparatively large, and there are changes in the individual members from time to time, especially in the members of the Board of Operatives, who are elected by the employees of the Company. It is, in the opinion of your complainants, essential that a proper set of rules and regulations be adopted for the guidance of the trustees in performing their duties. In your complainants' opinion, said rules and regulations should be reasonably suited to enable the trustees to carry out the functions of their trusteeship, and should be subject to proper amendment, and they should be in such form as to provide for the permanent administration of the trust in accordance with the wishes, desires, and intentions of the creator of the trust. Your complainants, acting as such trustees, have adopted, subject to approval by this court, a set of rules and regulations for the government of the trustees. A copy of such rules and regulations so adopted is attached hereto and marked Exhibit G and made fully a part hereof.

VIII

Your complainants desire instructions from this court as to their administration of said trust and a declaration of their

rights as such trustees and desire this court to determine:

1. Whether or not the complainants as such trustees in the proper management and conduct of said trust have the right and authority to adopt reasonable rules and regulations which will govern the conduct of said trust and the actions of your complainants and their successors as trustees in the management and conduct of such trust.

2. Whether or not in the opinion of this court the rules and regulations submitted herewith, marked Exhibit G, are reasonable and proper rules and regulations to be adopted by the trustees, and, if so, that this court will duly approve same.

PREMISES CONSIDERED, Your complainants pray that your Honors will take jurisdiction of this their bill of complaint and will cause to be made respondents to this bill of complaint Kyle Hardin, Thermun Streeter, Otis Ledbetter, James Whitehead, Frank Coupland, Henry Garrett, Ed Loring, Aaron Harris, R. C. Gilly, Will Bettis, Frank Roebuck, and George Denny, each of whom is an employee of American Cast Iron Pipe Company, and such other and further employees of such corporation, if any, as to your Honors may seem proper and just, and so order; that your Honors will decree that those parties made respondents and any additional employees of American Cast Iron Pipe Company directed to be made respondents will sufficiently represent the employees of American Cast Iron Pipe Company; and that because of the great inconvenience of making all of the employees of such American Cast Iron Pipe Company parties to this cause and of the

oppressive delays which will be occasioned should all of such employees be made parties, that it will be unnecessary to make parties and cause to be brought before this court any other employees than those names, and that the employees above named shall represent the interest of all employees of American Cast Iron Pipe Company.

Further praying, your complainants ask that proper process be ordered issued to each respondent named above and that they be required to plead, answer, or demur to this bill of complaint within the time required by law and that upon a hearing of this cause your Honors will decree that complainants are entitled to instructions from this court as to their administration of said trust and a declaration of their rights as such trustee under the will of John J. Eagan, and that your Honors will determine and declare whether or not your complainants as such trustees have the right and authority in the proper management and conduct of said trust to adopt reasonable rules and regulations which will govern the conduct of said trust and the actions of your complainants and their successors as trustees in the management and conduct of such trust, and that your Honors will determine whether or not the rules and regulations adopted by complainants as such trustees, and that if in the opinion of your Honors said rules and regulations are reasonable and proper to be adopted by said trustees, your Honors will enter a decree approving said rules and regulations and directing the trustees under the will of John J. Eagan to be governed and directed by said rules and regulations in their conduct of said trust.

And complainants pray for such other and further relief as in good conscience they may be entitled.

S/D.K. McKanny

Exhibit A to the 1942 Complaint
in *Moore v. Hardin*

COPY OF THE WILL OF JOHN J. EAGAN

State of Georgia)
County of Fulton)

I, John J. Eagan, of said State and County, being of sound and disposing mind and memory, do make this my last will and testament, hereby revoking all others by me heretofore made.

Item One- I give and bequeath to Marion M. Jackson the sum of eighteen thousand dollars.

Item Two- I direct that all debts owing me by Marion M. Jackson and his wife Evie Parsons Jackson at the time of my death be cancelled in full.

Item Three- I give and bequeath to J. E. Kirk, provided he be in my employ at the time of my death, the sum of twelve thousand dollars.

Item Four- I direct that all debts me by J. E. Kirk, at the time of my death, be cancelled.

Item Five- My Mother Mrs. Mary V. Eagan being advanced in years and possessed of an independent fortune I give and bequeath to her as tokens of my love and affection my gold watch and chain, the portraits of my Uncle and Grand Mother, my personal Bible and such others of my pictures and books as she may desire.

Item Six- I give and bequeath to each of my children living at the time of my death the sum of one thousand dollars.

Item Seven- I give, bequeath and devise to my wife Susan Young Eagan all other property owned by me, whether real or personal, of every kind whatsoever.

Item Eight- It is my request of my wife (and I know that she would be forward to do this without any request from me) that in case there should be any loss of my mother's fortune that she see my Mother is amply provided for out of the funds willed to her i.e. my wife Susan Young Eagan - It is not my request or desire that this item of my will shall delay any disposition of my estate or any part of same that my wife should desire to make. What I desire is that in case there should be loss of my Mother's fortune (which now seems humanly speaking impossible) my wife will see that my Mothers needs are provided for along with the needs of herself (my wife) and our children.

Item nine - I hereby appoint my wife Mrs. Susan Young Eagan executrix and Marion M. Jackson Executor of this my last will and testament. They are authorised to sell or exchange any propery securities at public or private sale, to make any investments, and to act with reference to my property under this will without order of Court and without making any report to said Court or to any Court of said executrix and executors actions.

This April twenty second 1922

John J. Eagan

Signed, sealed, published and declared by John J. Eagan as his last will and testament, in the presence of us, the undersigned, who subscribe our names hereto, in the presence of said testator, after he had signed his name thereto, and at his special instance and request - He signing in our presence and each of us signing in his presence and in the presence of each other.

A. E. Ramsuer
Nettie Catoe
H. A. Etheridge

Exhibit A to the 1942 Complaint
in *Moore v. Hardin*

COPY OF THE CODICIL TO THE WILL OF MR. JOHN J. EAGAN

Georgia,
Fulton County.

Whereas, I, John J. Eagan, did on the 22nd day of April, 1922, sign, seal, declare and publish my last will and testament in the presence of A.E. Ramsaur, Nettie Catoe and H. A. Ethridge, who signed said will and testament as witnesses:

And whereas, I desire to add an additional bequest and bequest and devise in said will and testament, I, therefore, make and declare and publish this codicil to said will and testament, to-wit:

I hereby give, bequeath and devise ten hundred and eighty-five (1,085) shares of the common stock of the American Cast Iron Pipe Company, being all of my holdings of said common stock of said Company, to the members of the Board of Management and the members of the Board of Operatives of said American Cast Iron Pipe Company, jointly, and their successors in office in said boards, as trustees, in trust for the following purposes, and subject to the directions hereinafter set forth, to-wit:

First: To receive all dividends paid upon said stock and use so much of the dividends thus received, as said trustees in their discretion may deem advisable in supplementing the salaries and wages of the employees of said American Cast Iron Pipe Company in amounts sufficient in the judgment of the said trustees to insure to each of said employees an income equivalent to a "living wage," said trustees to be the sole

judges of what constitutes a living wage, and of the amounts, if any, to be paid to each one or any of said employees of said Company.

Second: To use such sums from the dividends received upon said stock, as said trustees in their discretion may deem advisable, in paying an income to any employee, or to the wife and minor children of any employee of said American Cast Iron Pipe Company, at such time as the plant of said Company may shut down for any cause, or at such times as said employee through no fault of his or her own, but through accident, sickness, or other unavoidable causes, shall be unable to work; and said trustees are hereby made the sole judges of the amounts, if any, which shall be paid by said trustees to any employee, or to the members of any employee's family under the provisions of this paragraph.

Third: To vote said certificates of stock in said American Cast Iron Pipe Company at all meetings of stockholders of said Company.

It is my will and desire, and I direct that in determining all questions as to voting said stock and as to carrying out the provisions of the trust created by this codicil, the members of the Board of Management, as trustees, shall vote as a unit, the vote of each group to be determined by the majority vote of the members of the respective boards; and that in the event of the failure of the respective groups of trustees to agree upon any question said question in dispute shall be referred to the Board of Directors, whose decision on said question in dispute shall be final.

Any member of either of said boards, who shall cease to be a member of either board for any cause whatsoever shall thereupon cease to be a trustee under this codicil of my will, his or her successor upon either of said boards becoming, by virtue of his or her office, a trustee under this codicil, immediately upon his or her acceptance of said trust.

Any employee of said American Cast Iron Pipe Company who shall die, or who shall voluntarily or involuntarily, for any cause whatsoever other than temporary shutting down of the plant or plants of said Company, leave the employment of said Company, shall immediately thereupon cease to have any interest of any kind whatsoever in any income from, or in any part of the trust estate created by this codicil of my will.

Any person who may hereafter at any time enter the employment of said Company, shall immediately thereupon become a beneficiary of said trust estate, with all of the rights and privileges enjoyed by the employees of said Company at the time of my death, and subject to the same conditions.

The provisions of the two paragraphs immediately preceding this paragraph shall apply to the wife, or child, or the wife and children of said employee of said Company, if there be a wife, or child, or children, or both, provision having been made for them, in the event of the death of said employee leaving such, under the rules for the management of said Company or its pension fund.

By this codicil to my will and testament, it is my purpose, will and desire to create a trust estate both for the benefit of the persons actually in the employ of said American Cast Iron Pipe Company, and for such persons as may require the products of said Company.

The trustees, appointed by this codicil, in accepting the trust and acting hereunder, will be trustees both for said employees and said persons requiring the products of said Company. It is my will and desire that said trustees in the control of said Company, through the control of said common stock, shall be guided by the sole purpose of so managing said Company as to enable said American Cast Iron Pipe Company to deliver the Company's product to persons, requiring it, at actual cost, which shall be considered the lowest possible price consistent with the maintenance and extension of the Company's plant or plants and business and the payment of

reasonable salaries and wages to all of the employees of said Company, my object being to insure "service" both to the purchasing public and to labor on the basis of the Golden Rule given by our Lord and Savior Jesus Christ.

This 3rd day of April, 1923.

(Signed) Jno. J. Eagan.

Signed, sealed, declared and published by Jno. J. Eagan as a codicil to his last will and testament, in the presence of us, the undersigned, who subscribed our names hereto in the presence of said testator, after he had signed his name thereto, and at his special instance and request, and in the presence of each other, this 3rd day of April, 1923.

(Signed) Nettie Catoe,
Norman P. Coolege,
H. A. Etheridge.

Exhibit B to the 1942 Complaint
in *Moore v. Hardin*

STATEMENT OF JOHN J. EAGAN TO THE WHITE EMPLOYEES OF THE AMERICAN CAST IRON PIPE COMPANY AT THEIR ANNUAL MEETING CHRISTMAS SEASON 1921.

Never has Christmas, as a celebration of the birth of Jesus Christ, meant as much to Acipco as in 1921.

The teachings of Jesus Christ are to be made the controlling principles of the American Cast Iron Pipe Company. President-elect John J. Eagan announced this policy at the recent banquet of the Y. M. C. A. Mr. Eagan said he believed industry should be based on Christianity and that he understood this to mean:

(1) A reasonable living wage to the lowest paid workman.
(2) Constant employment to every member of the organization.
(3) An actual application of the Golden Rule to relations between employee and employer.

Regarding a reasonable living wage, Mr. Eagan said he had visited many of the homes of Acipco men and he was satisfied some of them had not been receiving living wages in the past.

The aim of this Company should be service, said Mr. Eagan- service divided as follows:

(1) Service to the public by manufacturing an honest and meritorious product.

(2) Service to employees by applying the Golden Rule.
(3) Service to the stockholders by making for them a fair return on the investment.

"At the unanimous request of the Directors of the Company" said Mr. Eagan, "I have accepted its Presidency, effective January 1st. My object in accepting this new relationship was that I might help to make the teachings of Jesus Christ the controlling principles in this business. I feel the more confident be cause some progress has already been made in this direction. One illustration of this is that for these last twelve months we have provided employment for all employees of this Company. This has not been easy.

"Another sign of the spirit of Christ in our plant is that we are paying wages above the market. We feel that the first charge upon an industry should be to provide such a wage as that every employee might be enabled to live in reasonable comfort. This is not easy to do in a business where competition is so keen. It is here that the Directors must ask the cooperation of every man of you. You are familiar with our wage scale and know that it is above the wages paid in the District. if we are able to continue to pay more than the market wage it must be because our men do better work, turn out more manufactured product, cause less breakage and repair work—in short, are worth more to our Company than these lower paid men are to the companies for which they work. You will have to help us in this. Your Directors are doing their level best, but they can't do it alone. The large percentage of good pipe you are making is a help. Study and see if there are not ways in which you can help so the Company may continue to pay more than the market wage. I do not know that it will be possible to continue doing this, but your Directors will do it as long as they can—much depends on you.

I might point out what I consider other evidences of the spirit of Jesus in our plant, such as this Y.M.C.A., our Service Department, including our physicians and surgeons, our dentist and nurse, our A.M.B.A. and our pension fund for old age or

disability, but you are familiar with these.

"What I am asking now is whether I may count on your cooperation in the effort to make the teachings of Jesus Christ the guiding principles in our plant?

"He taught, 'Whosoever shall be great among you let him be your minister; and whosoever will be chief among you let him be your servant; even as the Son of man came not to be ministered unto but to minister and give his life a ransom for many.' Matthew 20-26 to 28. And so if we would follow his teachings in this industry our aim must be service: Service to the public which needs the pipe we make to bring water to its cities, its institutions, the millions of homes in America and other lands served by America, service to our employees, particularly those least able to protect themselves, service to our stockholders who have entrusted this investment into our hands.

"It is the hope of our Directors to make out organization thoroughly democratic and cooperative. We have begun by a distribution of responsibility. This has been divided under four heads, Sales, Manufacturing, Purchases and Employment, and Finance. The following have been placed in full charge of their respective departments:

" Mr. Paul Ivy in charge of Sales, including direction of Traffic, Advertising, etc.

"Mr. W. D. Moore in charge of Manufacturing, including both Acipco and Beggs Plants.

"Mr. C. D. Barr charge of Purchases and Service Department, including employment, time office service, medical service, etc.

"Mr. A T. McWane in charge of Finance, General Office and Land Department.

"These four, with myself will form an executive committee which has been entrusted by the Directors with the operation of the business and the execution of policies of that Board. I am asking that every man, from the newest member of our organization to the oldest, cooperate with the head of their respective department, so that one department may compete with another as to which shall render the greatest and most worthwhile service; that as a result of such united and self-sacrificing cooperation the American Cast Iron Pipe Company may be able to render true and real service to the public, to each employee from the weakest to the strongest and return to our stockholders a good account for what they have entrusted to us."

Exhibit C to the 1942 Complaint
in *Moore v. Hardin*

Some announcement will be forthcoming within the next week or two from the undersigned committee of Foremen on the plans for the election. This committee has no authority to nominate candidates for the Board of Operatives or in any way to control the working out of the plan of cooperation. The Committee is only a means by which the employees can nominate their own candidates if they decide they want to take part in the plan. Each employee should at once begin consideration of the man from his division who would be the best suited for this position. Nominees for the Board of Operatives must be white employees who have been continuously in the employ of the Company three years and those voting in the election must have been in the continuous employ of the Company ninety days. In the last analysis, the success or failure of the plan of cooperation will depend on the selection to the Board of Operatives of wise, sincere, courageous, God-fearing men.

BOARD OF OPERATIVES

The Board of Management of the American Cast Iron Company asks that the employees of the Company elect representation from their number that constitute and to be known as the Board of Operatives.

This Board of Operatives is expected to provide a channel to secure and insure close relations and intelligent cooperation on the part of all connected with our organization.

The Board of Operatives will have access to the books of the Company and will be made familiar with its monthly, quarterly and yearly statement of earnings. It will be consulted

by the Board of Management on questions affecting the employees, including any important changes in wages, hours of work or working conditions.

It will be expected to make recommendations to the Board of Management on such matters affecting the employees as it may desire, and may report these recommendations to the Board of Management either in writing or in person through its chairman, or arrange a conference when all its members may meet with the Board of Management at a time mutually convenient.

It will be expected to nominate to the stockholders of the Company two of its members as directors of the Company.

In order to facilitate its work it shall appoint three sub-committees, with names and duties as follows:

LIVING CONDITIONS COMMITTEE: This sub-committee will make recommendations with a view to helping the management of the 'company in its aim to see that every employee working regularly and faithfully for the Company shall be offered constant employment and shall receive such a wage as will enable him to live in reasonable comfort.

COMMITTEE ON WORKING CONDITIONS: This sub-committee will make recommendations on matters of wages, working hours, and the comfort and safety of working conditions.

COMMITTEE ON RECREATION & EDUCATION: This sub-committee will make recommendations on matters in connection with the recreation and education of employees and their families.

The above named sub-committees will report to the Board of Operatives, which will, after due consideration, make such recommendations to the Board of Management as it may deem wise.

DIRECTORS OF COLORED Y. M. C. A.

The members of the Colored Y. M. C. A. are asked to elect twelve directors who shall have the same relationship and perform the same duties with regard to the Colored Y.M.C.A. as the present directors of the Acipco White Y. M. C. A., entertain to that organization.

In addition to this, these directors shall constitute a Board which the Board of Management or the Board of Operatives may call into conference on any matters affecting the interests of the colored employees.

Exhibit D to the 1942 Complaint
in *Moore v. Hardin*

Atlanta, GA, April 22, 1922

Board of Management:
Board of Operatives:

Gentlemen:

My conviction, that the first charge upon industry should be a living wage for every employee, employed therein and doing honest work, has led me to the decision herein expressed.

I am the owner of 1,085 shares of the common stock of the American Cast Iron Pipe Company. My intention is to have the dividends in cash or stock, paid or to be paid in cash or stock upon said 1, 085 shares of stock from moneys earned since the 31st day of December 1921, and hereafter to be earned, paid to trustees for the employees of said American Cast Iron Co., said dividends to be disbursed or invested by said trustees in a way to insure to each of said employees an income, which, together with the wage or salary paid to said employee, will enable said employee to maintain a reasonable standard of living.

After each employee of said company shall have received an income or wage, sufficient, in the judgment of the Board of Management and the Board of Operatives of said company, to constitute a living wage, a sum, sufficient to pay me 8% per annum upon the money, actually invested by me in said stock, will be reserved and paid to me. All other earnings over and above said 8%, upon said actual investment, will be paid to said trustees to be disbursed or invested by said trustees for the benefit of said employees of said company, as the judgment of said trustees may dictate.

Any employee leaving the service of the company, either voluntarily or involuntarily, for any cause whatsoever, will automatically, by that act surrender any and all interest in the trust estate, which I propose to create, and from and after the date of the resignation, or discharge, or going from the employ of said company by said employee, said employee shall have no further interest in said trust estate or any part thereof, or in any payment made or to be made therefrom by said trustees.

Under the trust which I propose to create, neither the employees of said company, nor said trustees, representing said employees, will have any interest in earnings of said Company upon said stock, until after the Board of Directors of said American Cast Iron Pipe Company shall actually have declared a dividend from said earnings, and said dividend has been actually paid by the duly accredited officers of said company, my intention being not to convey to said employees, or to said trustees for them, any right or title in or to the earnings of said stock, until said earnings have been actually paid out, from time to time by said directors in dividends, upon and after which payment of said dividends, and only then, the interest of said trustees for said employees in said dividends shall vest, and notbefore.

Neither will any employee of said company have the right to mortgage, transfer, or assign by deed or any other instrument, his interest in and to any part of said trust estate. Nor will any heir of any employee take by will or inheritance the interest of said employee in said trust estate, Whether in past or future earnings thereof, ceasing wholly on the day of said employee's death, said interest to be handled and disbursed by said trustees solely and only for the benefit of the surviving living employees of said American Cast Iron Pipe Company.

In the creation of this trust, I shall reserve the right to change abrogate or annul any part or all of the instrument creating said trust estate at any time on giving notice in writing, addressed to the trustees, twelve months in advance of said

proposed change, abrogation or annulment. Other conditions may be added to the final trust agreement which I proposed to execute to carry out the purposed herein outlined.

It is my desire to appoint the Board of Management and the Board of Operatives as Trustees for the employees to receive and manage the earnings upon said described stock, as above outlined.

I would ask that you carefully consider the whole matter and advise me whether or not you would accept such a trust in the event that it is tendered you. At the same time, I should appreciate any suggestions, which may occur to you, as to any part or the whole of the proposed plan. I am feeling my way in working out the handling of the stock which I own in the American Cast Iron Pipe Company in a way which will be fair to all, and in accord with the principles set forth by me and approved by the Board of Management when I accepted the Presidence of this Company. In this I need and invite your help.

Sincerely yours,
John J. Eagan.

EXHIBIT E to the 1942 Complaint
in *Moore v. Hardin*

RULES AND REGULATIONS BOARD OF OPERATIVES OF AMERICAN CAST IRON PIPE COMPANY, BIRMINGHAM, ALABAMA.

Article 1.

Section 1. The name of this board shall be the Board of Operatives of the American Cast Iron Pipe Company.

Section 2. The object of this board shall be to promote improvements in living and working conditions of employees of said company, to cooperate with the company in all things tending to promote the common good, and to secure and insure close relations and intelligent cooperation on the part of all connected with the organization of the American Cast Iron Pipe Company.

Section 3. The Board shall have access to the books of the Company and shall be made familiar with its monthly, quarterly and yearly statement of earnings. It will be consulted by the Board of Management on questions affecting the employees, such as important general changes in wages, hours of work, or working conditions.

The Board will be expected to make recommendations to the Board of Management on such matters affecting the employees as it may desire, and may report these recommendations to the Board of Management either in writing or in person, through its chairman, or arrange a conference when all its members may meet with the Board
of Management at such time as is mutually convenient.

Article 2.

Section 1. To be eligible for election to the Board of Operatives, a candidate shall be a white man twenty-one or more years of age, who is not an official of the company (shop foremen excepted) shall have been in the employ of the company for three or more continuous full years prior to the date of his proposed election, shall be an American citizen and shall be nominated by a majority fo the votes cast in the division he is to represent.

Section 2. Employees who have been in the service of the Company for three or more continuous full months prior to a nomination and election, shall be eligible in the nomination to cast one ballot each for two nominees for each representative to be elected in their respective divisions, and in said election and in any run-off election that may be necessary in electing representatives from said nominees, said voters shall be eligible to cast one ballot each for each representative to b elected in their respective divisions.

Article 3.

Section 1. The election of the Board of Operatives shall be by secret ballot and shall be held on the first Monday in April of each year, the term of office of the successful candidates to begin on the first Monday of May following.

Section 2. A sufficient time before the date of each annual election, the Board of Operatives shall appoint an Election Committee from among those employees eligible to vote in the election. This Committee shall make all arrangements for, and have complete charge of, the nomination and election, counting of ballots and all similar details connected with such election, and shall make a written report of the election results to the Board of Operatives not later than the last Monday in April. Members of the Board of Operatives shall be ineligible for membership on the Election Committee By the nomination election the shall provide at least two (2) candidates for each

representative to be elected.

Vacancies on the Board of Operatives shall be filled as soon as possible by a special election called by the Board in the division affected. The rules for the regular annual election shall govern special elections.

Section 3. The number of members on the Board of Operatives and the combinations of departments into electoral divisions shall be subject to change once a year, prior to the annual election, and such change shall be made by a two-thirds majority of the Board of Operatives, and with the consent and approval of the Board of Management.

Article 4.

Section 1 The officers of the Board of Operatives shall be a chairman, vice-chairman, and secretary, who shall be elected annually by the Board at the first meeting officially attended by the newly elected members, and a treasurer. The treasurer of the American Cast Iron Pipe Company shall be the treasurer of the Board of Operatives.

Article 5.

Section 1. The Board of Operatives shall nominate annually at the first meeting officially attended by the newly elected members, two of its members to the stockholders of the American Cast Iron Pipe Company for election as directors of the said Company and two of its members for membership on the Pension Board. In case of a vacancy for any reason in the representation of the Board of Operatives on the Board of Directors of the Pension Board, the Board of Operatives shall nominate one of its members for the unexpired term.

Section 2. The Board of Operatives shall have the right to carry any grievance of any employee, or any group of employees, or any exemployee to that member of the Board of Man-

agement in whose department said employee, group of employees, or exemployee is, or was, employed. If unable to make adjustment satisfactory to all persons concerned, the matter may then be referred to the Board of Management.

Article 6.

Section 1. The order of business at the meetings of the Board of Operatives and all questions of parliamentary procedure shall be handled according to the regulations set forth in " Roberts Rules of Order." The regular meetings of the Board shall be held on the first Monday of each month, at such times and place as the Board shall determine.

Section 2. Absence by a member of the Board from two consecutive meetings, except for absence from the city, illness, or other reasons satisfactory to the other members of the Board, shall act as a resignation of this office.

Section 3. Special meetings of the Board of Operatives shall be called by the chairman or, in his absence, by the vice-chairman, or at the request of any four members of the Board.

Section 4. During the term of office of any member of the Board of Operatives, said member shall be allowed during his regular working hours such time as may be required to properly attend to the business of the Board of Operatives, and his wages or salary, or standing in his department shall not be affected by his absence from his regular work for the above reasons.

Section 5. In order to facilitate its work, the Chairman of the Board of Operatives shall appoint annually standing committees subject to the approval of the Board with names and duties as follows:

LIVING CONDITIONS COMMITTEE: This subcommittee will made recommendations with a view of helping the management of the company in its aim to see that every

employee working regularly and faithfully for the company shall be offered regular employment and shall receive such wage as will enable him to live in reasonable comfort.

COMMITTEE ON WORKING CONDITIONS: This sub-committee will make recommendations on matters of wages, working hours, and the comfort and safety of working conditions.

COMMITTEE ON RECREATION AND EDUCATION: This sub-committee will make recommendations on matter in connection with the recreation and education of employees and their families.

The above named sub-committees will report to the Board of Operatives, which will, after due consideration, make such recommendations to the Board of Management as it may deem wise.

Section 6. In general, employees shall present their suggestions, grievances or communications to the Board of Operatives through the representative elected from their respective divisions. If, However, for any reason an employee prefers to communicate to the Board directly through its chairman, vice-chairman, or secretary, he or she shall be free to do so.

Section 7. These rules and regulations may be amended at any meeting of the Board of Operatives by a two-thirds vote of the total membership of the Board, providing notice has been given in writing to every member at the regular meeting of the Board preceding, and provided further that said amendment is submitted to, and approved by the Board of Management and the Board of Directors.

Excerpt from Exhibit F to the
1942 Complaint in
Moore v. Hardin

ARTICLE IV

Directors

Section 1: The Board of Directors shall consist of not less than twelve members, whose positions as Directors shall be numbered from one to twelve, inclusive. It may consist of fourteen members, the additional positions as Directors being numbered thirteen and fourteen. The Directors shall be elected by the holders of the common stock at the annual stockholders' meeting. Each Director elected shall be elected for the position of a particularly numbered Director. Vacancies occurring in the Board of Directors between the annual meetings shall be filled only by the common stockholders.

Section 2: Should any Director who is also an officer or an employee of the corporation cease for any reason to be an officer or an employee then he shall also immediately cease to be a Director of the corporation and the vacancy thus created shall be filled as above provided. If any Director who is also a member of the Board of Operatives shall cease to be a member of such Board, or if any Director who is also a member of the Board of Management shall cease to be a member of such Board of Management then he shall also cease to be a member of the Board of Directors of the corporation and the vacancy thus created shall be filled as above provided.

Section 3: The Board of Directors at the meeting first held after the annual meeting of the stockholders (this shall be deemed the annual meeting of the Directors) shall elect a Chairman of the Board of Directors, a President, a Vice President, a Secretary and a Treasurer, each of whom shall serve until the next annual meeting of the Directors and until their successors have been elected and qualified, unless his or their

tenure of office shall be sooner ended by the Board of Directors. Any two of the above offices may be filled by the same person, except that the same person shall not hold the offices of Secretary and Treasurer at the same time. These officers may be removed only by the Board of Directors.

The Board of Directors may also elect one or more Assistant Vice Presidents and an Assistant Secretary and an Assistant Treasurer, whose terms of office shall be as above provided.

Section 4: The annual meeting of the Board of Directors shall be held on the third Thursday in February of each year, and special meetings may be held at any time when called, as provided in section 7 hereof. Provided, however, that the first meeting of Board of Directors held after the annual meeting of the stockholders shall be deemed the annual meeting of the Directors, whether said meeting shall be held on the third Thursday in February or at some other time. In addition to the annual meeting regular meetings of the Board of Directors shall be held during the months of May, August, and November of each year. The regular place of meeting of Directors shall be at the office of the Company in Jefferson County, Alabama, but Directors' meetings may be held at other places within or without the State of Alabama.

Section 5: A majority of the members of the Board of Directors shall constitute a quorum. If less than a quorum is present at any meeting of the Board of Directors a majority of those present may adjourn the meting from time to time. Any action of the Board of Directors, other than the adjournment of a meeting at which a quorum is not present, shall require either an affirmative or negative vote of a majority of all of the members of the Board of Directors.

Section 6: The Directors may by signed resolution act on any question and if two-thirds of the Directors so vote in favor of said action it shall have the same validity as if the question had been determined by a vote in meeting assembled. The

signature of each Director must be affixed in the presence of, and witnessed by a Notary Public.

Section 7: Meetings of the Board of Directors may be called by the Chairman of the Board of Directors or, in his absence or inability to act, by the President, or in his absence or inability to act, by the Vice President by notice given to each member of the board twenty-four (24) hours before the date of such meeting, which notice shall state the time and place of such meeting. Notice may be delivered in person and need not be in writing. If a Directors' meeting shall be called to be held at any other place than in Jefferson County, Alabama, five (5) days' notice in writing thereof must be given to each Director, which notice shall state the time and place of such meeting and the object thereof, and no business other than that specified in the call for such meeting shall be considered at such meeting.

Any three Directors may call a meeting of the Board of Directors by ten (10) days' notice in writing. The signature to such notice must be notarized and the notice must state the time, place and object of the meeting. No business may be transacted at such meeting except that set forth in the notice.

Section 8: Dividends out of the net profits of the Company or out of its earned surplus may be declared and paid as often and at such times as the Board of Directors may determine. Said Board shall have exclusive power as to the determination of whether dividends should be paid and as to the amounts and times of such payments.

Section 9: The seal of the company shall continue to be in the form now being used, the imprint of which here appears; but the Board of Directors is authorized the change the same from time to time as it may deem proper. Said seal shall be in the keeping of the Secretary of the Company and shall be affixed only by the Secretary of the Company, except that it may be affixed by other officers from time to time when directed by the Board of Directors.

Section 10: All notes, checks, drafts, and other orders for the payment of money, all documents, contracts, and conveyances shall be signed and countersigned or attested as the Board of Directors may from time to time in its discretion determine.

Section 11: The Board of Directors is charged with the general conduct of the affairs of the Company. The Board may appoint and remove at will and fix and change the duties and compensation of its officers.

Section 12: The officers of the Company under direction of its Board of Directors shall have power to borrow money from time to time and to execute and deliver promissory notes and other evidences of such indebtedness. This shall be done in such manner as the Board of Directors may from time to time in its discretion direct.

ARTICLE V

Board of Management

Section 1: The Board of Management shall constitute the Executive Committee of the Board of Directors, and shall have all of the powers of that Board when said Board of Directors is not in session, except as otherwise provided in these by-laws. The affirmative vote of at least three members of the Board of Management shall be necessary for any action by said Board.

Section 2: The Board of Management shall consist of five members, as follows: The President, the Vice President, the Treasurer, the Sales Manager, and the Works Manager. The President, the Vice President, and the Treasurer shall be ex-officio members of the Board of Management.

Section 3: The Sales Manager and the Works Manager shall be appointed to their respective positions by the President with the approval of the Board of Management. If the said

appointees are not Directors of the Company at the time of their approval by the Board of Management, then it shall be the duty of the Secretary of the Board of Management to certify such approval to the stockholders, thereby recommending said appointees to membership on the Board of Directors subject to the election by the stockholders at their next annual meeting. Upon election to membership on the Board of Directors by said stockholders then the Sales Manager and the Works Manager shall become members of the Board of Management. In the event said appointees or either of them should already be Directors of the Company, then appointment as Sales Manager and/or Works Manager by the President with the approval of the Board of Management shall be tantamount to appointment to and membership on the Board of Management.

Section 4: The Sales Manager and Works Manager may be removed as such by the President at any time, subject to the approval of the Board of Management. Should the Sales Manager or the Works Manager be removed as such Sales Manager or as such Works Manager, then either or both of them shall cease to be a Director or Directors of the Company immediately upon such removal or removals. The compensation of the Sales Manager and of the Works Manager shall be fixed by the President, subject to the approval of the Board of Management.

ARTICLE VI

Officers

Section 1: It shall be the duty of the Chairman of the Board of Directors to preside at all meetings of the Board of Directors.

Section 2: The President, subject to the Directors, shall be the chief executive officer of the Company, having general oversight and control of its affairs, and shall perform such

other duties as the Board of Directors may from time to time direct. The President shall preside at all meetings of the Board of Management, and in the absence of the Chairman of the Board of Directors, or in case of his inability to act, the President shall preside at all meetings of the stockholders and Directors.

Section 3: The Vice President shall preside at all meetings of the stockholders, Directors, and of the Board of Management in the absence of the Chairman of the Board of Directors and the President or in case of the inability of the Chairman of the Board of Directors and the President to act. The Vice President shall perform such other duties as the Board of Directors may from time to time direct.

Section 4: The Secretary shall keep all minutes of stockholders' and the Directors' meetings; may issue notice of called or special meetings of stockholders or of Directors; and shall perform any and all other duties which the Board of Directors may from time to time direct. He shall also be the Secretary of the Board of Management.

Section 5: The Assistant Secretary shall, in the absence or inability of the Secretary to act, subject to the Board of Management, perform any or all of the duties of the Secretary.

Section 6: The Treasurer, jointly with such other officer or officers as the Board of Directors may designate, shall sign all certificates of stock. He shall have custody of all of the funds and securities and other negotiable paper of the Company, depositing same in such banks as the Board of Directors may in its discretion from time to time direct; he shall have charge of the books of accounts of the Company, and shall perform such other duties as the Board of Directors may from time to time direct. He shall furnish surety bond in such amount as may be prescribed by the Board of Directors.

Section 7: The Assistant Treasurer shall, in the absence or inability of the Treasurer to act, perform all or any duties of

the Treasurer, subject to the Board of Management.

Section 8: The compensation of the Chairman of the Board of Directors and of the President shall be fixed by the Board of Directors. The compensation of the Vice President, the Secretary, and the Treasurer shall be fixed by the President, subject to the approval by the Board of Directors.

ARTICLE VII

Board of Operatives

Section 1: The Board of Operatives shall constitute an advisory council to the Board of Management. It shall consist of twelve employees of the Company who are not members of the Board of Management or supervisory group of the Company (shop foremen excepted). The members of the Board of Operatives shall be elected from the electoral divisions of the Company as follows:

No. 1 District is composed of the Monocast Shops.

Four members shall be elected from this District.

No. 2 District is composed of the Mechanical Repair Department, Electrical Repair Department, and Construction Department.

Two members shall be elected from this District.

No. 3 District is composed of Machine Shop and Pattern Shop.

Two members shall be elected from this District.

No. 4 District composed of the Special Foundry Department.

Two members shall be elected from this District.

No. 5 District is composed of the General Yards, Loading Yards, Storeroom, Laboratory, Watchman, and the negro employees only of the Y. M. C. A., Restaurant, Medical Department, Main Office and Cooperative Store.

Two members shall be elected from this District.

The number of members of the Board of Operatives and the combination of departments into electoral divisions, however, shall be subject to change once a year prior to the annual election of members of the Board of Operatives by an affirmative vote of two- thirds of the members of the Board of Operatives and with the approval of the Board of Management.

Section 2: The Board of Operatives shall have access to the books of the Company and shall be informed as to its monthly, quarterly, and yearly statements of earnings. It shall be consulted by the Board of Management on questions affecting the employees, such as important general changes in wages, hours of work, or working conditions. The Board of Operatives may make recommendations to the Board of Management on such matters affecting the employees as it may desire.

Section 3: To be eligible to nomination and election to the Board of Operatives, an employee shall be a white man twenty-one (21) years of age, or more, who is not a member of the Board of Management or supervisory group of the Company (shop foremen excepted, shall have been an employee of the company for three or more continuous full years prior to the date of his nomination, shall be an American citizen, and shall be elected by majority of the votes case in the division he is to represent.

Section 4: An election for the Board of Operatives shall be held on the first pay day in April of each year, and shall be by

secret ballot. One-half of the number of members of the Board of Operatives from each District shall be elected each year. The term of office of those elected shall begin on the first Monday in May following election and shall be for a term of two years. Every employee, white and Negro, of this company who has been in the service of the company for six or more continuous full months prior to the election, working at the plant in Birmingham, Alabama, and employed in one of the electoral divisions of the company provided for in these by-laws and who is not a member of the Management or supervisory group of the company (shop foremen excepted), shall be entitled to vote for members of the Board of Operatives. The regular election and the filling of vacancies shall be conducted in accordance with the rules and regulations of the Board of Operatives, which rules and regulations shall be approved by the Board of Management.

ARTICLE VIII

Negro Auxiliary Board

Section 1: The Negro Auxiliary Board shall constitute an advisory council to the Board of Operatives and the Board of Management. It shall consist of twelve (12) negro employees of the Company elected from the electoral divisions of the Company as follows:

No. 1 District is composed of the Monocast Shops.

Four members shall be elected from this District.

No. 2 District is composed of the Mechanical Repair Department, Electrical Repair Department.

Two members shall be elected from this District.

No. 3 District is composed of Machine Shop & Pattern Shop.

Two members shall be elected from this District.

No. 4 District is composed of the Special Foundry Department.

Two members shall be elected from this District.

No. 5 District is composed of the General Yards, Loading Yards, Laboratory, Y.M.C.A., Restaurant, Medical Department, Main Office and Cooperative Store.

Two members shall be elected from this District.

The number of members of the Negro Auxiliary Board and the combination of departments into electoral divisions, however, shall be the same number and the same electoral divisions as shall be provided for the Board of Operatives.

Section 2: The Negro Auxiliary Board may make recommendations to the Board of Operatives and the Board of Management on such matters as it may desire which affect living conditions, working conditions, hours and wages among the negro employees, and as to such matters as it may desire which affect the moral, spiritual, and educational and recreational progress as related to the negro employees.

Section 3: To be eligible to the nomination and election to the Negro Auxiliary Board, an employee shall be a Negro man twenty-one (21) years of age or more, who shall have been an employee of the company for three or more continuous full years prior to the date of his nomination; shall be an American citizen; and shall be elected by a majority of the votes cast in the division he is to represent.

Section 4: An election for the Negro Auxiliary Board shall be held on the first Pay Day in April of each year and shall be by secret ballot. One-half of the number of the Negro Auxiliary Board from each District shall be elected each year. The term of office of those elected shall begin on the first

EXHIBIT G to the Complaint
in *Moore v. Hardin*

RULES AND REGULATIONS FOR THE GOVERNMENT OF THE BOARD OF TRUSTEES UNDER THE WILL OF JOHN J. EAGAN, DECEASED.

ARTICLE I

Official Designation

The official designation of this Board shall be "Board of Trustees under the will of John J. Eagan."

ARTICLE II

Meetings

Section 1. The annual meeting of the Board of Trustees created by the codicil to the will of John J. Eagan shall be held on the fourth Monday in January of each year at the executive offices of the Company in Birmingham, Alabama.

Section 2. Special meetings of the Board may be called at any time on three days' notice to all of the members of the said Board, which said notice may be verbal or in writing, and shall state the time and place of the holding of the meetings. All meetings of the Board shall be held at the executive offices of the American Cast Iron Pipe Company at Birmingham, Alabama, unless for urgent reason the meeting be called for some other place. The call shall be made by the Secretary, at the instance of the Chairman, or, in his absence or inability to act, at the instance of the Vice Chairman. In the event that the Chairman should refuse or fail, or in his absence or inability to act, the Vice Chairman should be absent, or refuse or fail upon the written request of a majority of the members of either the Board of Operatives or the Board of Management to make the

call, then the meeting may be called at the instance of a majority of the members of either of said Boards, but such call must be in writing, stating the time and place of meeting, and given to each member of the Board of Trustees at least ten days prior to the meeting, and no business other than that specified in the call shall be considered at such meeting.

ARTICLE III

Officers

The officers of the Board of Trustees shall be a Chairman, a Vice Chairman, a Secretary, and a Treasurer. The President of American Cast Iron Pipe Company, by virtue of his office, shall be Chairman of this Board of Trustees, and the Chairman of the Board of Operatives of said Company, by virtue of his office, shall be Vice Chairman of this Board of Trustees, The Treasurer of said American Cast Iron Pipe Company, by virtue of his office, shall be Treasurer of the Board of Trustees, and the Secretary of said Company, by virtue of his office, shall be Secretary of the Board of Trustees. The Treasurer shall from time to time give such bond, with good and sufficient surety, as the Board of Trustees may determine to be right and proper.

ARTICLE IV

Chairman

The duties of the Chairman shall be to preside at all meetings; to cause special meetings to be called when occasion may require; to sign all documents necessary or proper to be signed by the Board of Trustees when authorized by the Board.

ARTICLE V

Vice Chairman

The Vice Chairman shall perform the duties of the Chairman in his absence or disability.

ARTICLE VI

Secretary

The Secretary of the Board shall keep the minutes of the Board and be the custodian of its records. He may issue calls for special meetings of the Board in accordance with these rules and regulations.

ARTICLE VII

Treasurer

The Treasurer of the Board of Trustees shall receive all moneys payable to the Board; shall disburse the same in accordance with the directions of the Board; shall keep accurate accounts of moneys coming into his hands and moneys paid out. He shall have and keep an accurate and proper system of books, records, and vouchers, which shall at all times be the property of the Board of Trustees and shall be subject to inspection by the Board, its officers, or agents.

ARTICLE VIII

Signature of Checks

Checks drawn on any bank account, or on any other account of the Board of Trustees, shall be signed by the Treasurer or Secretary and countersigned by the Chairman or Vice Chairman of the Board. Checks so drawn shall be sufficient to withdraw the funds of this Board on deposit in any bank against which the same may be drawn.

ARTICLE IX

Eligibility for Membership

The Board of Trustees under the will of John J. Eagan consists of two separate units, one the Board of Management,

and one the Board of Operatives of the American Cast Iron Pipe Company. The Board of Operatives shall be composed of white men twenty-one years or more of age, who are not members of the Board of Management or supervisory group of the Company (shop foremen excepted), who shall have been in the employ of said Company for three or more continuous full years prior to the date of their election. They shall be American citizens and shall be elected to said Board of Operatives in accordance with the by-laws of the American Cast Iron Pipe Company and in accordance with the rules and regulations of the Board of Operatives. Members of the Board of Management shall be chosen in accordance with the by-laws of the American Cast Iron Pipe Company.

ARTICLE X

Qualifying

Before a man can serve as a member of the Board of Trustees under the will of John J. Eagan, he shall take the oath of office, which oath of office shall consist of the codicil to the will of John J. Eagan, deceased, followed by the following words:

> "We, the undersigned, do hereby accept membership on this Board of Trustees under the codicil to the will of John J. Eagan, with a full knowledge of the provision of this codicil, copy of which is reproduced above.
>
> "In accepting this position of trust, we declare ourselves to be in full sympathy with broad scope of its purposes, and acknowledge our belief in Jesus Christ, and the practical application of His teachings to industrial problems and progress.
>
> "It shall be our irrevocable purpose so to demean ourselves in this office that the management of this trust shall be in the spirit of John Eagan; that the

> principles set forth in this codicil shall be the rule and guide to our conduct of the affairs entrusted to us; to the end that this institution shall be preserved and shall render' * * * service, both to the purchasing public and to labor on the basis of the Golden Rule given by our Lord and Savior, Jesus Christ.'"

Should any person elected refuse to sign said oath of office, then he shall be immediately disqualified from occupying the position as a member of the Board of Trustees, and there shall automatically exist a vacancy in the office to which such member refusing to take such oath shall have been elected. The Secretary shall furnish a certificate to the Board of Trustees showing that each member of said Board has signed the oath of office

ARTICLE XI

Voting

Section 1. This Board of Trustees, for the purpose of voting on all matters coming before the Board of Trustees, shall be divided into two units, each of which shall cast one vote. The two units shall be the Board of Management and the Board of Operatives of American Cast Iron Pipe Company. In determining how the vote of the Board of Management shall be cast, only members of the Board of Management shall vote, and a majority vote of the members thereof shall determine how the vote of that unit shall be cast. In the same manner, in determining how the vote of the Board of Operatives shall be cast, only members of said Board shall vote, and the vote of a majority of the members of said Board shall determine how the vote of said unit shall be cast. In the event the two units of the Board of Trustees shall fail to agree upon any question, then said question in dispute may be referred to the Board of Directors, who decision on said question in dispute shall be final. Either the Board of Management or the Board of Operatives may direct the Secretary of this Board to refer said question to the Board of Directors. The Secretary shall make such reference in

writing. Any meeting of the members of the Board of Directors held for the purpose of deciding a question in dispute between the two units shall be presided over by an attorney authorized to practice law in *Birmingham, Alabama,* who is not a member of either the Board of Operatives or the Board of Management. Such presiding officer shall be paid a reasonable fee for his services. He shall be appointed by the presiding judge of the court having jurisdiction over this trust, which court is at the present time the Circuit Court of the Tenth Judicial Circuit of Alabama.

Section 2. All shares of common stock of American Cast Iron Pipe Company owned by the Board of Trustees shall be voted as a unit on all questions arising in the meetings of the stockholders of American Cast Iron Pipe Company. How said shares of stock shall be voted on any question shall be determined by a vote of the two units as provided in section one of this article.

Section 3 All shares of common stock of American Cast Iron Pipe Company owned by this Board of Trustees shall be voted at the election of Directors of American Cast Iron Pipe Company as follows:

Director number one, for the President of the Company;

Director number two, for the Vice President of the Company;

Director number three, for the Treasurer of the Company;

Director number four, for the Sales Manager of the Company;

Director number five, for the Works Manager of the Company;

Director number six, for a Member of the Board of Operatives;

Director number seven, for a Member of the Board of Operatives;

Director number eight, for a member of the clerical force of the Company;

Director number nine, for an employee from the Company organization at large;

Director number ten, for one who is neither an officer nor an employee of the Company, but who shall be selected as one who can fairly represent invested capital;

Director number eleven, for one who is neither an officer nor an employee of the Company, but who shall be selected as one who can fairly represent the interest of the buying public;

Director number twelve, for one who is neither an officer nor an employee of the Company, but who shall be selected as one who can fairly represent the religious, social, and educational life of the country.

In determining the person for whom the shares of common stock owned by the Board of Trustees shall be cast for Directors numbers six and seven, said persons shall be nominated by the Board of Operatives and when so nominated, the entire number of such shares of common stock shall be voted for said persons.

For Director number eight, said shares of common stock shall be voted for the person who is nominated by the votes of the employees in the clerical departments of the Company, including the main office, the Service Department, the Cooperative Store, the Medical Department, and any clerical forces not otherwise entitled to vote for members of the Board of Operatives. The Board of Directors of the Company shall make rules and regulations for the nomination of the person to be elected to position of Director number eight by the clerical forces.

In determining the person for whom said shares of common stock shall be voted for Directors numbers nine, ten, eleven, and twelve, the Board of Management shall cast one vote and the Board of Operatives shall cast one vote, and should said votes not be cast for the same person, then the question in dispute shall be referred to the Board of Directors as provided in Section one of this article.

Should the Board of Directors of the Company elect one of its members to function exclusively as Chairman of the Board of Directors, then said shares of common stock shall be voted for said person for the position of Director number thirteen.

Should the Board of Directors of the Company elect one of its members to function exclusively as a technical director, then said shares of common stock shall be voted for said person for the position of Director number fourteen.

The position of Director number thirteen shall not be filled unless the Board of Directors shall elect one of its members as Chairman of the Board of Directors, and the position of Director number fourteen shall not be filled unless the Board of Directors shall elect one of its members as a technical director.

ARTICLE XII

These rules and regulations shall be submitted to the Circuit Court of the Tenth Judicial Circuit of Alabama, Chancery Division, for approval, and when approved by decree of said court, shall not be amended, altered, or changed, except by affirmative vote of the two units composing this Board of Trustees, except that they may be amended, altered, or changed in case of a division in the vote of the two units by submitting the disputed question to the Board of Directors and then submitting any changes approved by the Board of Directors and one only of the two Boards to the court having jurisdiction over this trust for approval or rejection, which court is at the present time the Chancery Division of the Circuit Court of the Tenth Judicial Circuit of Alabama.

APPENDIX B

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
OF ALABAMA, IN EQUITY.

W. D. Moore, C. D. Barr, C. O. Hodges, J. J. Swenson, and H. J. Noble, constituting the Board of Management of American Cast Iron Pipe Company, a corporation; and T. J. Reynolds, Eugene Sparkman, Earl Fox, Robert Nash, T. V. Vines, J. H. Brakefield, J. H. Ardis, J. W. Washburn, D. T. Hull, H. T. Lavender, and F. D. Rogers, constituting the Board of Operatives of American Cast Iron Pipe Company, a corporation; and together constituting the Board of Trustees under the codicil to the will of John J. Eagan, deceased,
Complainants,

VERSUS

Kyle Hardin, Thermun Streeter, Otis Ledbetter, James Whitehead, Frank Coupland, Henry Garret, Ed Loring, Aaron Harris, R. C. Gilly, Will Bettis, Frank Roebuck, and George Denny,
Respondents.

NO._____

DECREE OF THE COURT

This cause coming on to be heard upon the petition of

the complainants, as trustees under the codicil to the will of John J. Eagan, deceased, and the complainants being represented in court by their solicitor of record, and the named respondents having filed an answer and being represented in court by their solicitor of record, the cause being submitted upon the pleadings, upon the testimony of witnesses, and upon exhibits and documentary evidence, all as noted by the Register, the court is of the opinion and finds as a matter of fact:

1. The complainants are the duly constituted members of the Board of Management and the Board of Operatives of American Cast Iron Pipe Company, and as such are the trustees of the trust created by the terms of the codicil to the will of John J. Eagan, deceased. They have accepted said trust, taken possession of the trust estate, and are actively managing same.

2. The corpus of the trust estate created by said codicil, consists of 1085 shares of the common stock of American Cast Iron Pipe Company, a corporation organized under the laws of the State of Georgia and having its principal place of business in Birmingham, Jefferson County, Alabama, at which place is located its plant for the manufacture of cast iron pipe and other products and its general offices. These 1085 shares of common stock constitute the entire outstanding common stock of this corporation.

3. The beneficiaries of the trust created by said codicil to the will of John J. Eagan are the employees of American Cast Iron Pipe Company. These employees at the present time are more than one thousand five hundred in number. All of said employees reside in Jefferson County, Alabama, with the

exception of a few employed at branch sales offices. All of the trustees reside in Jefferson County, Alabama. It is impracticable to make all of the employees of American Cast Iron Pipe Company respondents to this cause. To do so would cause great inconvenience, great expense, and oppressive delays in hearing this cause, and would result in no useful purpose. Twelve of said employees have been made respondents and are represented by their solicitor of record. They are employed in the various departments of the plant of the American Cast Iron Pipe Company and perform various classes of work. Some of said respondents are white employees and some are negro employees. The interest of all of the employees of American Cast Iron Pipe Company in the subject matter of this suit is the same, and the court finds that the employees named respondents are sufficiently representative of all classes of such employees, and that it is unnecessary to make any other of such employees respondents to this cause.

4. The complainants, as trustees of the trust created by the codicil to the will of John J. Eagan are entitled to have a declaration from this court of their rights as such trustees in the particulars prayed for in the bill of complaint, and to a direction from this court in regard to the particular acts as to which they pray direction in the bill of complaint, and to have this court determine such questions of construction of the codicil to the will of John J. Eagan as are necessary to such declaration of rights and to such direction as to their acts in the administration of said trust.

5. John J. Eagan was the owner in December, 1921, of

1085 shares of the common stock of American Cast Iron Pipe Company, being the entire outstanding common stock of said American Cast Iron Pipe Company. By virtue of his ownership of said stock he was then in a position to direct and control the affairs of said corporation. He was a man of deep religious convictions and was interested in improving employer-employee relations and had made a careful study for many years of such relations. In December, 1921, he decided to put into operation a plan now known as the "Eagan Plan", for the conduct of the affairs of the American Cast Iron Pipe Company. Under the terms of this plan he proposed to create two boards which would operate as a part of the corporate set-up of the American Cast Iron Pipe Company. One of these boards he called the Board of Management. This board was the executive committee of the Board of Directors of the corporation and under Mr. Eagan's plan was to be composed of the President of the corporation, the Vice President of the corporation in charge of purchases and Service Department, the Works Manager of the corporation, the Sales Manager of the corporation, and the Treasurer of the corporation. Each was a member of the Board of Directors. John J. Eagan, by appropriate corporate action, had the name of the executive committee of the Board of Directors changed to the Board of Management. According to the plan of Mr. Eagan, a second Board was set up and named the Board of Operatives. According to the plan of John J. Eagan, to be eligible for election to the Board of Operatives a candidate must be a white man twenty-one or more years of age, who is not an official of the Company (shop formen

excepted), shall have been in the employ of the Company for three or more continuous full years prior to the date of his proposed election, must be an American citizen and must be nominated by a majority of the votes cast in the division he is to represent. According to said plan, employees who have been in the service of the company for three or more continuous full months prior to a nomination and election (this was later changed to six months) were eligible in the nomination of a candidate for the Board of Operatives to cast one ballot each for two nominees for each representative to be elected in their respective divisions, and in the election and in any run-off election that might be necessary in electing representatives from among said nominees said voters were eligible to cast one ballot each for each representative to be elected in their respective divisions. This plan was put into effect in the first rules and regulations adopted by the Board of Operatives, a true and correct copy of which is attached to the bill of complaint and marked Exhibit E.

The plan was submitted to the employees at the Christmas Season of 1921 by Mr. Eagan personally. Attached to the bill of complaint, marked Exhibit B, is a report which the court finds to be a true and accurate report of the remarks of John J. Eagan at the time the plan was first submitted. The plan was then presented to the employees in writing, and a true and correct copy of the written proposal is attached to the bill of complaint marked Exhibit C. The proposed plan was accepted by the employees and the first Board of Operatives was elected in March, 1922, and the Eagan plan was put into operation. It

functioned under Mr. Eagan's guidance as a part of the set-up of the American Cast Iron Pipe Company until his death on March 30, 1924. At his death Mr. Eagan left a will and codicil to the will, the codicil being dated April 3, 1923. By the terms of this codicil, the 1085 shares of the common stock of the American Cast Iron Pipe Company owned by Mr. Eagan was devised "to the members of the Board of Management and the members of the Board of Operatives of said American Cast Iron Pipe Company, jointly, and their successors in office in said boards, as trustees". The court finds as a fact that the Board of Management and the Board of Operatives referred to in the codicil to said will is the Board of Management and the Board of Operatives set up by Mr. Eagan as a part of the Eagan Plan, and that the complainants in this cause and their successors in office are the trustees under the terms of the codicil to said will. The court further finds that it was an integral part of the Eagan Plan that there should always be elected to the Board of Directors of the American Cast Iron Pipe Company by the vote of the trustees the five members of the Board of Management. This is clear not only from the plan as submitted by Mr. Eagan and from his actions in so electing them, but from the fact that the Board of Management is the executive committee of the Board of Directors of the corporation, and its members must, therefore, be members of the Board of Directors of the corporation in order to be members of the Board of Trustees. The court further finds that it was an integral part of the Eagan Plan that two members of the Board of Operatives should be elected to the Board of Directors of the corporation, these two mem-

bers to be nominated by the Board of Operatives from among its members, and that it was also an integral part of the Eagan Plan that one member of the clerical forces of the Company should be elected to the Board of Directors, such member to be nominated by the votes of the employees of the clerical departments of the Company, including the main office, the Service Department, the cooperative store, the Medical Department, and any clerical forces not otherwise entitled to vote for the members of the Board of Operatives, and that one member of the Board of Directors should be elected from the employees at large of the corporation. The court further finds that it was an integral part of the Eagan Plan that three members of the Board of Directors of the corporation should be elected who were neither members of either of the boards nor employees of the Company. One such member was to be chosen as a representative of the preferred stockholders or capital, one as a member who could fairly represent the religious, social, and educational life of the country, and the third who could fairly represent the buying public. The court further finds that as an integral part of the Eagan Plan there was created what is no called the Negro Auxiliary Board to the Board of Operatives. This board was to be composed of twelve negro employees of the corporation, and to be eligible for election to said board a candidate must be a negro man twenty-one years of age or more, who shall have been an employee of the Company for three or more continuous full years prior to the date of his nomination, shall be an American citizen, and shall be elected by a majority of the votes cast in the division he is to represent.

Every negro employee of the Company who has been in the employ of the Company for six or more full months prior to the election and who works at the plant of the Company in Birmingham, Alabama, and is employed in one of the electoral divisions, shall be entitled to vote for members of the Negro Auxiliary Board. The duties and functions of the Negro Auxiliary Board are clearly set forth in the exhibits to the bill of complaint. The court further finds that after the death of Mr. Eagan the Board of Management and the Board of Operatives of the American Cast Iron Pipe Company entered upon their duties as trustees and have continuously since that time actively and fully performed their duties as trustees in accordance with the Eagan Plan. The court finds that it is desirable and in fact necessary to the proper operation of the Eagan Plan and of the trust of which complainants are trustees that suitable rules and regulations for the government of the Board of Trustees shall be adopted. The court has examined the set of rules and regulations adopted by the Board of Trustees, a copy of which is attached as an exhibit to the bill of complaint, and the court finds that these are reasonable rules and regulations for the government of the action of the Board of Trustees in the proper performance of their duties as trustees.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED:

1. The complainants, as trustees of the trust created by the codicil to the will of John J. Eagan, are entitled to apply for

and to obtain instructions from this court as to their administration of said trust.

2. The complainants, as trustees, have the right and authority in the proper management and conduct of said trust to adopt reasonable rules and regulations to govern the conduct of said trust and the actions of the complainants and their successors as trustees in the management and conduct of such trust.

3. The rules and regulations adopted by complainants as such trustees are reasonable and proper rules and regulations to be adopted by them as such trustees and said rules and regulations are hereby in all things approved, and the complainants and their successors as such trustees are ordered to be governed and directed by said rules and regulations in their conduct of said trust.

4. The costs of this proceeding are directed to be paid by the complainants as trustees.

Done this 6th day of April, 1942.

S/Judge J. Edgar Bowron

APPENDIX C

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA
EQUITY DIVISION

W. D. MOORE, C. D. BARR, C. O. HODGES, J. J. SWENSON, and H. J. NOBLE, constituting the Board of Management of American Cast Iron Pipe Company, a corporation; and T. J. REYNOLDS, EUGENE SPARKMAN, EARL FOX, ROBERT NASH, T.V. VINES, J. H. BRAKEFIELD, J. H. ARDIS, J. W. WASHBURN, D. T. HULL, H. T. LAVENDER, and F. D. ROGERS, constituting the Board of Operatives of American Cast Iron Pipe Company, a corporation; and together constituting the Board of Trustees under the codicil to the will of John J. Eagan, deceased,	)	CIVIL ACTION NO. 53715
Complaintants,	)	
v.	)	
KYLE HARDIN, THERMUN STREETER, OTIS LEDBETTER, JAMES WHITEHEAD, FRANK COUPLAND, HENRY GARRET, ED LORING, AARON HARRIS,	)	

R. C. GILLY, WILL BETTIS, FRANK ROEBUCK AND GEORGE DENNY,

Respondents.

MOTION UNDER RULE 60, ALABAMA RULES OF CIVIL PROCEDURE FOR RELIEF FROM JUDGMENT AND TO DECLARE JUDGMENT VOID AND FOR PRELIMINARY INJUNCTION

Come now Leland C. Adams, Jr., Robert Bates, Gary L. Bradford, Robert M. Myers, James C. Frederick, William H. Hill, Nick Johnson, David J. Keeton, James Sloan, Earl Russell and Tommy Allbright, who presently constitute eleven of the twelve duly elected members of the Board of Operatives of the American Cast Iron Pipe Company and of the John J. Eagan Trust, and who together with the Board of Management constitute the Board of Trustees of the John J. Eagan Trust, and who are, in that capacity, successors in interest to the plaintiff Board of Operatives and its then members T. J. Reynolds, Eugene Sparkman, Earl Fox, Robert Nash, T. V. Vines, J. H. Brakefield, J. H. Ardis, J. W. Washburn, D. T. Hull, H. T. Lavender and F. D. Rogers in the above-styled cause and move this Court under the provisions of Rules 60(b) (4) and (6) of the Alabama Rules of Civil Procedure for an order relieving them from the judgment or decree of this Court dated April 6, 1942, and show in support thereof as follows:

1. The movants constitute eleven of the twelve currently sitting and duly elected members of the Board of Operatives of the John J. Eagan Trust and the American Cast

Iron Pipe Company ("ACIPCO"). The Board of Operatives is designated in the codicil of the Will of John J. Eagan as one of the two trustees of the charitable trust created by that codicil to Mr. Eagan's will. A copy of that codicil is attached hereto as Exhibit "A". The other trustee is the Board of Management. The Board of Operatives is elected by the hourly wage employees of ACIPCO employed in the production departments. The Board of Management is a self perpetuating group of the five principal officers of ACIPCO.

2. When this case was filed on April 2, 1942, the membership of the Board of Operatives was restricted by the rules of the trust and ACIPCO to white males, despite the fact that many black persons were employed at ACIPCO. Moreover, black employees were not allowed by the aforesaid rules to vote for or otherwise participate in the selection and election process for the members of the Board of Operatives. The black employees of ACIPCO, despite being named as beneficiaries of the Eagan Trust, were excluded from any role in the governance of the trust or the selection of the trustees solely on the basis of their race, while the white employees were allowed to serve as trustees and vote to select trustees based solely on their race. Black persons were not eligible for membership on the Board of Management. The racially discriminatory Board of Operatives and Board of Management were the plaintiffs in this case.

3. The defendants in the case were some black and some white employees of ACIPCO. Nothing in the record of this case shows who selected these defendants or the basis for

their selection. There is some testimony in the record that these defendants are "fairly representative" of the white employees and are "fair representatives of the colored employees." This testimony is, however, advanced as that "opinion" of one Henry J. Noble and one L. B. Bascomb. No facts are stated in support of these opinions. There were at that time approximately 1600 employees at ACIPCO, 900 of whom were black. No class certification hearing to certify a defendant class was ever held by the Court and no class certification of the defendant class or of these defendants as proper representatives of the defendant class was ever made. No notice of pendency of the class action was ever given to the putative class members and no opportunity to appear and be heard or to otherwise object to the certification of the class or these defendants as class representatives was ever given to the putative class members. In fact, attached hereto as Exhibit "B" is the affidavit of James Whitehead, one of the named defendants and the only one the movants believe to still be alive and able to recall the relevant events, which affirmatively shows that at least one of the defendant "class representatives" did not even know the nature of the proceeding.

4. The failure of the purported defendant "class representatives" to understand the nature of the proceedings is understandable when the record shows the complaint was filed on April 2, 1942, a waiver of service and notice signed by the defendants was filed on April 3, 1942 and a final decree entered on April 6, 1942. Reference to a calendar will show that April 2, 1942 was on Monday and April 6, 1942 on Friday.

Thus, within a five day week this case was filed and a final decree entered.

5. The record affirmatively shows there was no case or controversey between the plaintiffs and the defendants. There are in the record what appear to be summaries or notes of testimony of certain persons. None of these persons testified in opposition to the relief requested in the complaint. None of these witnesses testified that the defendants, individually or otherwise, have contested any conduct of the plaintiffs or that any of the employees the defendants supposedly represent have challenged or questioned any conduct or actions of the plaintiffs. There is no evidence or allegation that the trust instrument requires or even suggests a ruling of some court on the matters and things alleged in the complaint or ruled on in the final decree in this case. The record does affirmatively show that the plaintiffs and their predecessors in interest had operated the trust for 18 years prior to this decision without any ruling by any court such as the one here sought.

6. The matters and things alleged in the complaint and decided in the decree of the Court were clearly intended to bind and effect the rights of future beneficiaries of the Eagan Trust. The decree was also intended to bind and affect the rights of minor employees of ACIPCO and minor beneficiaries of the trust. The plaintiffs failed to request the Court to appoint a guardian ad litem to protect the interests of future beneficiaries or minor beneficiaries and the Court did not appoint such a guardian ad litem as was required by Alabama law at times relevant hereto.

7. The movants aver that the action was a collusive action in that it was an attempt to throw the cloak of judicial protection over a private deal and arrangement between the plaintiffs and that the defendants were not persons challenging or disputing any matter with the plaintiffs, but were persons whose continued employment at ACIPCO was at the whims and will of the plaintiff Board of Management and who were under the control of that plaintiff, who were added as defendants solely to provide the necessary window dressing for the fraudulent judicial decision.

8. The movants aver that the final decree of the Court is void because:

(a) The Court had no jurisdiction;

(b) The Court acted in violation of the United States Constitution in judicially enforcing a racially discriminating scheme of trust management and control and the decree should be set aside in accordance with the principles established in *Shelby v. Kraemer*, 334 U.S. l, 92 L. Ed. 1161, 68 S. Ct. 836 (1948); *Evans v. Abney*, 396 U.S. 435, 24 L. Ed. 2d 634, 90 S. Ct. 628 (1970); *Pettway v. American Cast Iron Pipe Company*, 494 F. 2d 211 (5th Cir. 1974), *reh. den.* 494 F. 2d 1296, *app. after remand* 576 F. 2d 1157, *reh. den.* 581 F. 267, *cert. den.* 439 U. S. 1115, *app. after remand* 681 F. 2d 1259 and 721 F. 2d 315, *cert. den.* 104 S. Ct. 3515 (*Daniel v. Pettway*), *cert. dismissed* 104 S. Ct. 3526;

(c) The decree adjudicates the rights of parties who were not before the Court;

(d) The decree was entered and filed without compliance with and in violation of the rules of law applicable to this

case;

(e) The proceedings in the case were so devoid of compliance with the fundamental requirements of procedural and/or substantive due process of law as to render the final decree based on those proceedings void.

RELIEF SOUGHT

9. Movants pray that this Court will, set this matter for hearing, and after hearing evidence, enter an order setting aside and vacating the Court's order of April 6, 1942 as being void because (a) the Court entering the April 6, 1942 order lacked jurisdiction; (b) because the April 6, 1942 order promulgates a racially discriminatory scheme of trust management and control; (c) because no guardian ad litem was ever appointed to represent the interests of future beneficiaries or minor beneficiaries of the trust; (d) the Decree, purports to adjudicate the rights of parties not before the Court; (e) the Decree was entered in violation of the then applicable rules of law; (f) the proceedings leading to the Order were devoid of fundamental compliance with the requirements of procedural and substantive due process.

10. The movants aver that under the provisions of Rule 60(b) (6) of the Alabama Rules of Civil Procedure, the Court should grant the following alternative relief:

(a) Set aside the final decree of the Court, realign the plaintiff Board of Operatives as a defendant, designate the movants as defendants by virtue of their membership of the

Board of Operatives, order the realigned defendants to plead or otherwise respond to the complaint and order all parties to show cause why the Court should not appoint a guardian ad litem to represent the future beneficiaries of the Eagan Trust and the minor employees of ACIPCO, if any.

(b) Dismiss the action for failure to state a claim on which relief could be based in that the complaint fails to state a case or controversy.

11. In addition to the foregoing, your movants also show that the Board of Management has filed in the Circuit Court of Jefferson County, Alabama, law division, a case styled, *In the Matter of the Petition of American Cast Iron Pipe Company, et al,* Civil Action No. CV86-636, a copy of the petition in that case is attached hereto as Exhibit "C". The basis on which the Board of Management relies for the authority to file the said action and to seek the relief sought in the said 86-636 is the decree of this Court of April 6, 1942, the decision which your movants attack in this proceeding as being void. You movants further show that the Supreme Court of Alabama in *Ex Parte Nick Johnson,* et al, 20 ABR 337 (1985) held that the Board of Operatives were necessary parties to proceedings such as 86-636 and held that by virtue of the 1942 decision in this case,[1] the Circuit Court of Jefferson County, Chancery Division "retained jurisdiction over this trust". The Petition in 86-636 is set for hearing before the Presiding Judge of this Court on March 10, 1986. Your movants show that because the proceedings pending in 86-636 are predicated upon the validity of this Court's April 6, 1942 decision, and the rules and

regulations of the Board of Trustees as adopted by that decision, the Board of Management should be preliminarily enjoined from proceeding in CV86-636 pending a ruling by this Court on this motion to set aside and vacate the April 6, 1942 decree. Therefore, you movants further pray that in addition to the relief sought hereinabove, that this Court will set this matter for hearing on preliminary injunction prior to March 10, 1986 and, upon said hearing enter an order preliminarily enjoining the Board of Management and its members from proceeding in any way in CV86-636, now pending on the law side of this Court until this Court has held a hearing on this motion and rendered a decision relative to this motion.

RESPECTFULLY SUBMITTED,

S/W. Eugene Rutledge, Attorney
for Movants

OF COUNSEL;
RUTLEDGE & KELLY, P.C.
1300 Brown Marx Tower
Birmingham, Alabama 35203
Telephone: (205) 322-8761

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[1] The Court in *Ex Parte Nick Johnson* assumed the validity of the 1942 decision in this case. The validity of the 1942 decision in this case was not raised in *Ex Parte Nick Johnson*.

NOTICE OF SETTING

Please take notice that the foregoing motion is set before Judge Cherner on the 7th day of March at 9:00 a.m.

S/Kay S. Kelly
Of Counsel

CERTIFICATE OF SERVICE

I do hereby certify that I have hand delivered a copy of the foregoing to Jack Noble, Esq. and Robert Tate, Esq. on this the 21st day of February, 1986.

S/Kay S. Kelly
Of Counsel

APPENDIX D

IN THE CIRCUIT COURT FOR THE
TENTH JUDICIAL CIRCUIT
OF ALABAMA
IN EQUITY

W. D. MOORE, et al,	)	
	)	
Plaintiffs,	)	
	)	
V.	)	CIVIL ACTION NO. 53715
	)	
KYLE HARDIN, et al,	)	
	)	
Defendants.	)	

AFFIDAVIT OF JAMES WHITEHEAD

My name is James Whitehead. I am an adult black resident citizen of Jefferson County, Alabama. I was employed at American Cast Iron Pipe Company beginning in June, 1936 and worked continuously at American Cast Iron Pipe Company until I retired from that company in September, 1976.

The document which is attached to this affidavit bears my signature. I remember signing the document in 1942 but I was not told at that time what the document was nor was I told that it had anything to do with any court proceedings.

The circumstances which lead up to my signing the document which is attached to this affidavit are as follows:

In 1942 I was working in the monocast department on the No. 2 ramming station. Mr. Eugene Sparkman was my

foreman on that job. While I was working at that job on the No. 2 ramming station in the monocast department I learned that there was going to be an opening in the company's "YMCA Building." They YMCA Building was a separate building on the American Cast Iron Pipe Company premises which at that time housed the personnel department of the company along with some other departments. The job which I heard would be opening was a position which involved writing articles for the black section of the American Cast Iron Pipe newspaper as well as keeping records relating to black employees, checking out towels to black employees and assigning lockers to black employees. This job which I was interested in, in the YMCA Building was a white collar job. I was very interested in that position because in 1942, and in many other years, it was very unusual for a black person to be able to obtain a white collar job at American Cast Iron Pipe Company and most of the jobs which black people held at the company were in lower paying, manual labor positions. I was very interested in moving from the No. 2 ramming station in the monocast department to this white collar position in the YMCA Building and so I applied for the YMCA job opening.

After I applied for the YMCA job, my supervisor on the No. 2 ramming station in the monocast department, Mr. Eugene Sparkman, approached me and asked if I would sign a document which he said would state that I approved of the Eagan plan. Mr. Sparkman explained that he understood that I had applied for the job in the American Cast Iron Pipe YMCA Building but that the company did not want anybody, espe-

cially a black, to be a part of the company or working in a job like the one I was seeking unless that person was in favor of the Eagan plan. He said that I would have to sign a document which stated that I pledged to uphold the Eagan plan if I wanted to get the YMCA job. He told me to go to Mr. Dyer's office to sign the document that he was talking about. Mr. Dyer was at that time to my knowledge the personnel manager of the America Cast Iron Pipe Company. His office was located in the YMCA Building on the American Cast Iron Pipe premises. I went to Mr. Dyer's office according to Mr. Sparkman's instructions. When I got to Mr. Dyer's office, Mr. Dyer stated that he had been expecting me and he already had a document on his desk which I was supposed to sign. Mr. Dyer asked me to sign the document. A copy of that document is attached to this affidavit. I did not read this document before I signed it because I was told that it only said that I pledged to uphold the Eagan plan. Neither Mr. Sparkman nor Mr. Dyer ever told me that the document which I was asked to sign and which I did sign had anything to do with any court case.

I was never asked if I was willing to represent other blacks or other employees of ACIPCO. I never saw or heard any testimony of any kind from W. D. Moore, Henry J. Noble, C. D. Barr, A. J. Bryant, Sr. or Lawton B. Bascomb. I never say or met any lawyer named Smyer nor did I ever see or meet or talk with any lawyer at all about any court case or about anything in connection with my signing of the document in question. I was never told that any lawyer named Smyer or any other lawyer was representing me.

I have read the foregoing and it is true and correct.

S/James B. Whitehead, Sr.

STATE OF ALABAMA
JEFFERSON COUNTY

Before me, the undersigned, a Notary Public for said County and said State, personally appeared James Whitehead, who, being first duly sworn, makes oath that he has read the foregoing Affidavit and is informed and believes, and upon such information and belief avers, that the facts alleged therein are true and correct.

S/James B. Whitehead, Sr.

Sworn to and subscribed before me on this the 21st day of February, 1986.

s/Ruby J. Mallory
Notary Public

CERTIFICATE OF SERVICE

I do hereby certify that I have hand delivered a copy of the foregoing to counsel of record, on this the 21st day of February, 1986.

S/Kay S. Kelly
Of Counsel

APPENDIX E

IN THE CIRCUIT COURT FOR THE
TENTH JUDICIAL CIRCUIT OF ALABAMA
EQUITY DIVISION

W. D. MOORE, et al., Plaintiffs,	)	
vs.	)	CIVIL ACTION NO. 53715
KYLE HARDIN, et al., Defendants.	)	

ORDER DENYING PRELIMINARY INJUNCTION ON THE MERITS

This case involves an action brought by the named plaintiffs in their capacity as members of the Board of Operatives of American Cast Iron Pipe Company ("ACIPCO") attacking the final judgment rendered in this case in 1942.

The plaintiffs, in their capacity as members of the Board of Operatives of ACIPCO, attack the final judgment by a motion under Rule 60(b) of the Alabama Rules of Civil Procedure. As this Court noted in an earlier decree rendered March 7, 1986, the position of the plaintiffs as the Board of Operatives is that the final judgment rendered in this case on April 6, 1942, is void because the Court had no jurisdiction to adjudicate the rights of the parties not before the Court and because the proceedings failed to comply with fundamental procedural requirements in that there was no real controversy existing between the parties. They also contend that the final decree is void on a number of other grounds, including the ground that

the Court, in entering the final decree, was in violation of the United States Constitution by enforcing a racially discriminatory scheme of trust management and control.

By its order dated March 7, 1986, the Court stated that it had not had sufficient opportunity to pass on the merits of the motion under Rule 60(b). However, the Court concluded that the Board of Operatives would not sustain irreparable injury if the proceeding before the Presiding Judge was allowed to go forward. Accordingly, the Court denied the petition without deciding on the merits of the same.

At this time, the Court will consider the merits of the plaintiffs' motion.

That part of the rules and regulations at issue in this case involve Article XI, Section 1, as follows:

> ...In the event the two units of the Board of Trustees shall fail to agree upon any question, then said question in dispute may be referred to the Board of Directors, whose decision on said question in dispute shall be final. Either the Board of Management or the Board of Operatives may direct the secretary of this Board to refer said question to the Board of Directors. The secretary shall make such reference in writing. Any meeting of the members of the Board of Directors held for the purpose of deciding a question in dispute between the two units shall be presided over by an attorney authorized to practice law in Birmingham, Alabama, who is not a member of either the board of Operatives or the Board of Management. Such presiding officer shall be paid a reasonable fee for his services. He shall be appointed by the presiding judge of the court having jurisdiction over this trust, which court is at the

present time the Circuit Court of the Tenth Judicial Court of Alabama.

Following a hearing on the petition of the trustees under the codicil to the will of John J. Eagan, deceased, this Court, by order dated April 6, 1942, decreed the following:

> 1. The complainants, as trustees of the trust created by the codicil to the will of John J. Eagan, are entitled to apply for and to obtain instructions from this court as to their administration of said trust.
>
> 2. The complainants, as trustees, have the right and authority in the proper management and conduct of said trust to adopt reasonable rules and regulations to govern the conduct of said trust and the actions of the complainants and their successors as trustees in the management and conduct of such trust.
>
> 3. The rules and regulations adopted by complainants as such trustees are reasonable and proper rules and regulations to be adopted by them as such trustees and said rules and regulations are hereby in all things approved, and the complainants and their successors as such trustees are ordered to be governed and directed by said rules and regulations in their conduct of said trust.

The Board of Operatives by their counsel argue that the 1942 decree is void for a number of reasons, including:

(1) There was no justiciable controversy, so that the Court had no jurisdiction;

(2) The decree purported to be binding on all employees

at ACIPCO in 1942 but no guardian ad litem had been appointed for future employees or for those who were not adults;

(3) The decree was unconstitutional because it violated the Fourteenth Amendment to the United States Constitution by enforcing racially restrictive provisions; and

(4) The 1942 decree was obtained by fraud.

Counsel for the plaintiffs is in error in stating that a justiciable controversy must be alleged and shown before this Court can take jurisdiction over a request by a trustee for instructions in the administration of a trust. *See, e.g., Peach v. First Nat'l Bank of Birmingham*, 247 Ala. 463, 25 So. 2d 153 (1946); *Thurlow v. Berry*, 247 ala. 631, 25 So. 2d 726 (1946); *Kimbrough v. Dickinson*, 247 Ala. 324, 24 So. 2d 424 (1946); *Dallas Art League v. Weaver*, 240 Ala. 432, 199 So. 831 (1941).

In *Peach, supra*, the Court quoted with approval the following:

> As a general principle when a trustee is in reasonable doubt as to the extent of his powers or as to the proper manner in which to proceed under the trust, he may apply to a court of equity, which will interpret the trust instrument when necessary and when it is ambiguous in order to give him directions without other equity appearing in the bill.

In Bogert, *The Law of Trusts & Trustees*, Section 559 (2d Rev. 1980), the following is provided:

> Equity has jurisdiction over all matters relating to trust property, and in the execution and administration of the trust, in all cases of doubt as to their

> rights and liabilities and what their conduct should be, trustees are entitled to and should seek instruction and direction from the court.

It is true, as counsel for the Board of Operatives states, that certain provisions of the rules and regulations adopted under the Eagan trust have been found to be in violation of the 1964 Civil Rights Act and in violation of the Constitution. In *Pettway v. American Cast Iron Pipe Co.*, 332 F. Supp. 811 (N.D. Ala. 1970), the federal district court held that the racial restriction on membership on the Board of Operatives to "white men only" was unlawful and "must be removed." However, the federal district court also stated:

> ... The Board of Operatives will continue to operate and to carry out its functions as an intregal part of the Eagan plan with its members serving as joint stockholders and cotrustees under the Eagan codicil as in the past, subject, however, to the elimination of the racial restrictions on its members. The court further finds that upon the elimination of the racial restriction on membership to the Board of Operatives, the continued and separate existence of the Advisory Auxilliary Board composed of negro employees only and elected by negro employees only would be unnecessary and the court holds that the continuation of such separate Auxilliary Board would also constitute a violation of Title VII. Therefore, the Auxilliary Board must be abolished simultaneously with the elimination of the racial restriction on membership of the Board of Operatives.
>
> The elimination of the racial restriction of the Board of Operatives, together with disestablishment of

> the separate Auxilliary Board will, in the opinion of the court, provide all employees of the company an equal opportunity regardless of the race or color to vote for representatives on the Board of Operatives and to serve on the Board of Operatives. Furthermore, in the future, the members of the Board of Operatives, elected and serving without regard to race or color, will be able to appoint all members of the standing committees and special committees of the Board of Operatives without being in violation of the provisions of Title VII.

At a subsequent evidentiary hearing, the federal district court approved a plan submitted by ACIPCO for the purpose of carrying out the directives of the Court. The plan of compliance enlarged the number of electoral districts from five to twelve and provided for the election of one representative on the Board of Operatives for each district. The Court concluded:

> The Court feels that it should not, and it will not, engage in a presumption that employees elected from fair and properly drawn electoral districts, will not fairly represent the interest and rights of employees of another race or color and faithfully serve as trustees under Mr. Eagan's will. . .

In short, the federal district court did not conclude that the Eagan plan was invalid or that this Court's decree rendered in 1942 was invalid because of racially restrictive provisions contained in the original plan. Instead, the Court ordered the removal of those restrictions and then approved the plan as being in compliance with the Civil Rights Act.

It is not for this Court at this time to conclude that this Court's decree rendered in 1942 interpreting the plan is invalid because racial restrictions since removed were left in place in 1942.

In *Ex parte Nick Johnson*, 20 A.B.R. 337 (Ala., November 8, 1985), ACIPCO filed a petition in the Tenth Judicial Circuit requesting the Presiding Judge to appoint an attorney to preside over the meeting of the Board of Directors of ACIPCO as provided for in the rules and regulations quoted in this opinion. The Court appointed an attorney to preside over the meeting without notice having been given to any other party. Three days later, members of the Board of Operatives filed a motion to vacate the appointment. When this motion was denied, the Board of Operatives filed a petition for writ of mandamus with the Supreme Court of Alabama seeking to required the circuit court to vacate the appointment. The Supreme court granted the writ, but only on the ground that the members of the Board of Operatives were entitled to reasonable notice and an opportunity to be heard in opposition to the application. The supreme court there stated:

> We do not agree with the petitioners' contention that the court below lacked subject matter jurisdiction. As we view the matter, the court acquired jurisdiction in the 1942 declaratory judgment action and, by approving and adopting the rules and regulations of the board of Trustees, it retained jurisdiction over this trust, the corpus of which is all located in Jefferson County . . . .

This Court also agrees with ACIPCO that it was not necessary in 1942 that every employee of ACIPCO be made a party or that a guardian ad litem had been appointed by the Court to represent future employees or those who were minors.

Equity Rule 30 provides in part as follows:

> *When parties are numerous, court may proceed, having before it parties to represent adverse interests.* When the parties having vested interest in real or personal property are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court, in its discretion, may dispense with the making of all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiff and the defendant in the suit. But in such cases the decree shall be without prejudice to the rights of the absent parties in that they may claim their shares of any funds in court, or if paid out by order of court, may recover their shares from parties to whom such funds have been so paid.

Similarly, Title 7, Section 128, Alabama Code 1958, provided:

> In equity of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; if the consent of any one who should have been joined as a plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the bill of complaint, and when the question is one of a common or general interest of many persons, or where the parties are numerous,

> and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.

That part of the rules and regulations of which the plaintiffs' complaint merely sets out a procedure for resolving a dispute occurring between the two units of the Board of Trustees. The Curt agrees with ACIPCO that all of the employees were not necessary parties to the 1942 action.

Finally, plaintiffs have failed to present any evidence of fraud sufficient to overturn the 1942 decree after a period of forty-four years.

Accordingly, the application for preliminary injunction is hereby denied on the merits.

Done and ordered this 29th day of May, 1986.

S/Judge Marvin Cherner

APPENDIX F

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
SPECIAL TERM, 1987

Leland C. Adams, Jr., et al.
85-300 v.
Carl P. Farlow, et al.

Leland C. Adams, Jr., et al.
85-448 v.
American Cast Iron Pipe Company, et al.

Leland C. Adams, Jr., et al.
85-888 v.
American Cast Iron Pipe Company, et al.

Leland C, Adams, Jr., et al.
85-1032 v.
Paul W. Green, et al.

Appeals from Jefferson Circuit Court
Equity Division

BEATTY, JUSTICE.

These four cases were consolidated on appeal. They arise from controversies between the two boards that comprise the board of trustees of the trust established by the codicil to the will of John J. Eagan. The two boards are the Board of

Operatives and the Board of Management.[1] The *res* of the trust is the American Cast Iron Pipe Company ("ACIPCo"). In a previous decision arising out of another controversy between these two boards, *Farlow v. Adams*, 474 So.2d 53 (Ala. 1985), this Court set out a brief explanation of the components of the Eagan trust and ACIPCo, which we quote here in order to provide a backdrop for an understanding of the various bases for the present controversies:

> "ACIPCo is a Georgia corporation with its principal place of business in Jefferson County, Alabama. . . . All shares of common stock in ACIPCo are held in trust for the benefit of ACIPCo employees according to the provisions contained in the will of John J. Eagan.* Under the terms of the trust, the Board of Operatives, which consists of twelve elected ACIPCo employees, is charged along with the Board of Management, with the duties of trustees. Two members of the Board of Operatives are elected to serve on the Board of Directors.
>
> "The Board of Management consists of the corporate officers of ACIPCo. The Board of Management also constitutes the Executive Committee of the Board of Directors.
>
> "According to the trust agreement, dividends are paid to the Board of Management and the Board of Operatives as the trustees of the employees, and the dividends are invested by the trustees to insure

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[1] In their respective briefs in each of these cases, the appellants and appellees have denominated each other as "Board of Operatives" and "Board of Management." We follow that denomination herein, referring to each as "Operatives" and "Management."

that each employee is provided an income which, together with the wage or salary, will insure a living wage to all employees.

"The Board of Operatives and the Board of Management have disagreed for several years over their respective roles, and the disputes have centered on the desire of the Operatives to establish a stronger voice in company decisions.

"[*Footnote 1] The relevant provisions of this trust are as follows:

"1. The voting stock of Acipco was left in trust to the Board of Trustees composed of the Board of Operatives and the Board of Management.

"2. The Board of Trustees was to do the following:

"(a) Receive dividends paid on the stock and use it, within their discretion, to insure a living wage to all employees.

"(b) Use the dividends, in their discretion, to aid employees and their wives and children in times of shutdown of the plant, illness, or unavoidable lay-off of employees.

"(c) To vote the stock at stockholders meetings.

"(d) To be trustees for employees and persons requiring the product of the company. The codicil closes with this direction by Mr. Eagan:

> "'The trustees, appointed by this codicil, in accepting the trust and acting hereunder will be trustees both for said employees and said persons requiring the product of said company. It is my will and

> desire that said trustees in the control of said company, through the control of said common stock, shall be guided by the sole purpose of so managing said company as to enable said American Cast Iron Pipe Company to deliver the company's product to persons, requiring it, at actual cost, which shall be considered the lowest possible price consistent with the maintenance and extension of the company's plant or plants and business and the payment of reasonable salaries and wages to all employees of said company, my object being to insure "service" both to the purchasing public and to labor on the basis of the Golden Rule given by our Lord and Savior Jesus Christ."

474 So.2d at 54-55.

In *Farlow v. Adams*, this Court held that members of the Operatives could not be fired without cause. We explained:

> "The ability of the Board of Directors of ACIPCo, dominated and controlled by the Board of Management, to arbitrarily and unilaterally discharge the employee trustees of the Eagan Trust, the Board of Operatives, would clearly result in the Board of Management's having unbridled and absolute power over the trust estate. We cannot construe the Eagan Trust to vest in management this power[,] . . . [and] we must conclude that Mr. Eagan intended that the Board of Operatives could be discharged only for cause. A contrary holding would allow the Board of Management unlimited control and would totally disregard Mr. Eagan's intent and purpose in creating the trust. Consequently, we agree with the trial court's order which reinstated the employees who were members of the Board of

Operatives."

474 So.2d at 58.

As the foundation for their various requests for relief in these consolidated cases, the Operatives contend that Management has attempted to ignore and circumvent this Court's decision in *Farlow v. Adams, supra,* and find other ways to dominate the trust. Additional facts specific to each appeal will be discussed in turn.

I. *85-300 Adams v. Farlow*

The facts pertinent to this appeal are as follows:

In early December 1984, E. E. Langner, ACIPCo's works manager and also a member of Management and the Board of Directors, issued a memorandum addressed to the Operatives concerning the enforcement of Plant Rule 12, which prohibits ACIPCo employees from "quitting work, leaving assigned work area, . . . or leaving during working hours without permission from immediate supervisor." In his memorandum to the Operatives, Langner stated the following:

> "In order that we do not have any misunderstanding about Plant Rule #12, I offer the following clarification.
>
> "Any employee must have permission to leave the plant while on Company time. Merely telling your supervisor that you are going to town or going to see your lawyer does not mean that you are granted permission to leave. The reason for needing to leave the plan must be given in order for any

> supervisor to make a logical decision on whether permission should be granted or not.
>
> "In the case of members of the Board of Operatives, if their supervisor or superintendent does not feel that he has sufficient reason to okay the Board Member leaving the plant, then the Board Member must obtain permission from Glenn Hicks, the Works Manager, or Assistant Works Manager.
>
> "Plant Rule #12 will be enforced in the future."

Apparently from the time of this memorandum and up until August 30, 1985, all of the Operatives abided by Plant Rule 12. The Operatives do not dispute Management's contention that the Operatives were never denied permission to leave the plant during their working hours to see their attorney; that no one ever inquired about the Operatives' reason or purpose for going to see their attorney; and that the Operatives were always able to perform their duties as Operatives and as trustees without violating this or other plant rules.

In August 1985, the Operatives learned that ACIPCo had hired, or was planning to hire, temporary contract labor from Manpower, Inc. Because the Operatives were of the opinion that the employment of contract labor was in violation of the Eagan trust, three of the members of the Operatives requested Carl P. Farlow, in his capacity as chairman of the board of trustees, to call a special trustees meeting for the purpose of discussing ACIPCo's use of contract labor. Farlow refused because he did not think that the use of Manpower, Inc., fell within the province of the board of trustees. Farlow also

assured these Operatives that no Manpower, Inc., workers would work 40 hours a week is any ACIPCo employee was working less than 40 hours a week.

After Farlow refused to call a special meeting, several Operatives members *orally* requested the vice chairman of the board of trustees, Leland Adams, to call the meeting. The rules and regulations governing the board of trustees, which are included in the by-laws of ACIPCo as Article VII, provide at Section 3 the procedure for calling a special trustees meeting:

> "Special meetings of the Board may be called at any time on three days' notice to all of the members of the said Board, which said notice may be verbal or in writing, and shall state the time and place of holding of the meetings. ... The call shall be made by the Secretary, at the instance of the Chairman, or, in his absence or inability to act, at the instance of the Vice Chairman. *In the event that the Chairman should refuse* or fail, *or in his absence or inability to act, the Vice Chairman should* be absent, or *refuse* or fail *upon written request of a majority of the members of either the Board of Operatives* or the Board of management to make the call, *then the meeting may be called at the instance of a majority of the members of either of said Boards,* but such call must be in writing, stating the time and place of meeting, and given to each member of the Board of Trustees at least ten days prior to the meeting, and no business other than that specified in the call shall be considered at such meeting."

(Emphasis added.)

On August 16, 1985, after Adams also refused to call the meeting, a majority of the Operatives, acting under the above

provision, issued a written call for a special trustees meeting to be held on August 27, 1985. When Farlow received his notice of this meeting, he then instructed the secretary of the board of trustees to call a special meeting for August 23, 1985, four days prior to the meeting called by the Operatives. Upon receiving notice of the August 23 meeting, two of the Operatives, Adams and Bradford, went to the Secretary, P. W. Green, and asked for an agenda of the meeting called by Farlow. Green explained that there was no agenda but told them that he presumed the purpose of the meeting was to discuss the contract labor issue.

At the August 23 meeting, Farlow told the Operatives that the meeting was called in response to their request for a meeting, and he took the position that the August 27 meeting called by the Operatives was improper because it had not been called in accordance with the by-laws. Farlow's interpretation of the portion of the by-laws quoted *supra* required the Operatives to submit their request *in writing* to Adams, the vice-chairman, upon Farlow's refusal to call the meeting. The Operatives disagreed and explained that they were not then prepared to discuss the contract labor issue because, for example, they had not prepared the resolutions they had planned to introduce. Farlow told the Operatives that there would not be an August 27 meeting, and that Management would not attend any meeting the Operatives attempted to conduct.

The Operatives assembled on August 27 for the trustees meeting they had called. None of the members of Management were present. Several of the Operatives attempted, but

were unable, to find any of the members of Management and were informed that Farlow was away from the plant and that all the others were out of town. The Operatives proceeded with their trustees meeting and passed the following resolution:

> "Be it resolved that the Board of Trustees of the John J. Eagan Trust, as codicil to the will of John F. Eagan, deceased, established that John J. Eagan Trust prohibits the American Cast Iron Pipe Company while owned by and administered under the terms and conditions of that trust, except as this Board of Trustees may, from time to time agree in emergency or unforeseen circumstances, from utilizing any labor in the production of any goods produced and sold by the American Cast Iron Pipe Company, except as is provided by those persons who are employed by American Cast Iron Pipe Company and are beneficiaries of the John J. Eagan Trust.
>
> "The Board of Trustees does hereby resolve that the use of contract labor, whether provided by an entity engaged in the provision of contract labor as a legal business or otherwise, is contrary to the provisions of the John J. Eagan Trust and is prohibited by the terms and conditions thereof except as to professional services provided by professional persons.
>
> "Be it further resolved that the Board of Trustees does hereby appoint as a Labor Problem Management Committee of the Board of Trustees the following members of the Board of Trustees: Leland C. Adams, Jr., Chairman, Carl P. Farlow, Vice Chairman, James Frederick, Gary Bradford, Richard Bragdon.

"The Board of Trustees hereby further directs the aforesaid committee to immediately inform Manpower, Inc. that all contract labor presently provided by Manpower, Inc. for use in American Cast Iron Pipe Company is to be immediately removed from the premises, and any and all contracts or agreements signed or otherwise entered into by American Cast Iron Pipe with Manpower, Inc. are immediately cancelled.

"The committee is further authorized to make payment of any sum now due, and to negotiate with Manpower the payment of any penalties that may be due under the terms and conditions of any contract or agreement entered into between Manpower, Inc. and American Cast Iron Pipe Company.

"Be it further resolved by the Board of Trustees that the aforesaid committee is directed to meet at the call of the Chairman and to draw up and approve, by majority vote of the members of the committee, the chairman having the full right to vote, rules and regulations for the recall of former employees or laid-off employees of American Cast Iron Pipe Company to perform such work as American Cast Iron Pipe Company may from time to time require, that in the absence of recall of such former employees or laid-off employees of American Cast Iron Pipe Company might otherwise be performed by contract labor. The rules and regulations so adopted by a majority vote of the aforesaid committee shall be final and binding unless the Board of Operatives and the Board of Management members of the Board of Trustees shall unanimously vote to change or alter all or some of the rules and regulations drawn up and adopted by the aforesaid committee.

> "Be it further resolved that the Board of Trustees does hereby forever prohibit American Cast Iron Pipe Company from employing contract labor for any purpose whatsoever and does direct that all labor provided to American Cast Iron Pipe Company, except for professional labor such as is provided by attorneys, accountants, doctors, nurses, and persons in recognized professions, shall be provided by employees of American Cast Iron Pipe Company. . . ."

The resolution went on to provide that the prohibition against using contract labor at ACIPCo would also apply to any wholly-owned subsidiaries of ACIPCo as soon as practicable.

On Friday, August 30, 1985, three days after the August 27 meeting, Adams had an appointment scheduled with the Operatives' attorney to prepare the necessary letters to be delivered to Farlow and the other committee members informing them of the above resolution. Early that morning, Adams asked his supervisor, Bert Bowlin, for permission to leave the plant during his working hours to see the Operatives' attorney. According to Adams, Bowlin gave him permission to leave. Bowlin, however, testified that he did not give Adams permission, and that since the December 7, 1984, memorandum (quoted *supra*), he had required Adams to obtain permission from Langner, the works manager. Adams testified that he did go to Langner's office to see him or one of his assistants about leaving the plant, but that none of them was present. Adams then went to see Glen Hicks, the personnel director, who was in a meeting. Because he was running late for his 8:00 a.m.

appointment, Adams did not wait for Hicks and, instead, asked Hick's secretary to tell him where he was going and that he could be reached there. When Hicks learned that Adams left the plant without obtaining his permission, he reported it to Langner around 9:30 a.m. Langner then checked with Bowlin, Adam's supervisor, to see if he had given Adams permission to leave. Upon learning that Bowlin had not given Adams permission to leave, Langner prepared a written reprimand on Adams that same day.

The following Monday was Labor Day, an ACIPCo holiday, so the "workload meeting" between the Operatives and one or more representatives from the works manager's office, which is regularly scheduled to be held every other Monday, was held at noon on Tuesday, September 5, 1985. At that meeting, Langner presented to each of the Operatives a written memorandum, set out below, concerning a change in the compensation to Operatives members for attending special Operatives meetings:

> "September 5, 1985
>
> "TO: MEMBERS OF THE BOARD OF OPERATIVES
>
> "I am sure that you are aware that the plant has failed to produce any profit this year through July. In an effort to reduce costs we have made economies in operating procedures and use of materials.
>
> "Most of our employees have taken up the slack, assumed extra duties and have done an excellent job of decreasing manhours per ton of product. At

the same time we have made significant improvements in the quality of our products. I am extremely grateful to these employees for their efforts. However, we are still not in a good cost position and must continue to work hard at reducing our manufacturing costs.

"As a part of this cost reduction program, I call your attention to Article VI, Section IV, of the 'Rules and Regulations of the Board of Operatives,' adopted by the Board of Operatives on July 14, 1970. This paragraph, listed in Section B2 of the ACIPCo Policy Manual, clearly states that a member of the Board of Operatives' ... shall be allowed during his regular working hours such time as may be required to properly attend to the business of the Board of Operatives and his wages or salary or standing in his department shall not be affected by his absence from his regular work for the above reason.'

"Board members will be compensated for time they are required by the Company to attend committee meetings and investigations, as well as for the regular meeting of the Board on the first Monday of each month whether during regular working hours or not. *Pay for special Board meetings not held during regular working hours must be authorized by the Works Manager's office.*

"Since the Board of Operatives in recent years has been allowed to operate outside the boundaries of the Rules and Regulations which they adopted in 1970, time for adjustment will be allowed. We will begin complying with the rules concerning pay with the estimate beginning September 23, 1985. Most of the Board members will realize very little effect from this compliance with the rules.

"I am also asking the Board of Operatives to please not have more persons than are required in committee meetings, investigations, etc. For instance, on Friday, August 16, there were seven Board members in the meeting investigating a discipline case. There should have been four.

"One other request is that you please report to your job at starting time. If you are tied up in a meeting, call and let your supervisor know and also let him know when he can expect you on the job so that he can arrange his people to cover for you. Most of you already do this.

"I appreciate your cooperation with the above.

"/s/E. E. Langner
"E. E. Langner
"Vice President & Works Manager"

(Emphasis added.)

Prior to this change, the Operatives did not have to obtain approval in order to be paid for non-scheduled Operatives meetings held before or after their respective regular working hours. The Operatives are paid their "regular shift differential for time charged to Board business during their normal scheduled work shift and hours." They are paid the first shift rate (apparently a higher rate) for time charged to board business in excess of regularly scheduled work hours. According to Langner, the requirement that overtime pay for non-scheduled meetings be authorized was imposed in response to alleged abuses by some of the Operatives, which he had either witnessed or which had been reported to him, resulting in

excessive amounts of overtime claimed by the Operatives.

At the conclusion of the September 3 workload meeting, Langner told Adams to report to Langner's office at 1:30 p.m. Adams went to Langner's office at 1:30 p.m. as directed, accompanied by another member of the Operatives. Hicks, the personnel director, was also present. At this meeting, Langner informed Adams that he was being given a written reprimand for violating Plant Rule 12 on August 30, 1985, by leaving the plant without permission. Langner read the reprimand to Adams but did not give him a copy.

On that same day, September 3, 1985, Farlow wrote Adams a letter in response to Adam's letter informing Farlow of the resolution passed by the Operatives acting as the board of trustees at their August 27 meeting which Management refused to attend. In this letter, set out in pertinent part below, Farlow once again disavowed and disaffirmed the validity of any of the actions taken by the Operatives purportedly acting as the board of trustees at the August 27 meeting, because he contended the meeting was improperly called and a quorum was not present:

> "Dear Lee:
>
> "This is in reply to your letter to me of August 30, 1985.
>
> "As pointed out in the meeting of the Board of Trustees held on Friday, August 23, at which you were present, the attempted call of a meeting for August 27 was ineffective for failing to comply with Section 3 of Article VII of the Rules and Regu-

lations of the Board as set out in the By-Laws of the Company and no meeting could be held pursuant to it. Consequently, no valid action could have been taken. Furthermore, even if a meeting had been properly called, no action could have been taken since a quorum was not present.

"As you know, the meeting called by the Secretary at my instance as Chairman of the Board of Trustees for August 23 was for the purpose of considering the use of contract labor, the matter referred to in the ineffective call of a meeting for August 27. This was done to accommodate the desire of the majority of the Board of Operatives to consider this matter and for a time when the members of the Board of Management could be present. At the August 23 meeting the Board of Operatives then stated they were not prepared to discuss the matter but would be prepared to do so at a meeting on August 27. It was pointed out that a meeting could not and would not be held on August 27 pursuant to the defective call, but that another meeting for that purpose could be held later upon a proper call.

"The resolution attached to your letter of August 30 has not been adopted by the Board of Trustees and is of no effect. So that there will be no misunderstanding, I want to make it clear that any action taken by any person purporting to act on behalf of American Cast Iron Pipe Company based on that resolution will be without proper authority and in direct disobedience thereof, and will be interfering with lawful business relationships of the Company.

"If the Board of Operatives wishes to present such a resolution to a properly called meeting of the Board of Trustees with a quorum present, it is, of course free to do so. In fact, as Chairman of the Board I will be willing to direct the Secretary to call

such a meeting at a mutually convenient time if you wish me to do so.

"Yours very truly,
"/s/Carl P. Farlow
"Carl P. Farlow

(Emphasis added.)

The Operatives contend that the phrase "without proper authority," included in the sentence emphasized above, is in reference to Plant Rule 6, which prohibits "[d]isobedience to proper authority," the minimum penalties for which include: reprimand for a first offense; two-week layoff for a second offense; and discharge for a third offense.

Responding to what it perceived to be threats of punitive actions against them by Management, the Operatives filed a motion in this case on September 16, 1985, seeking a temporary restraining order and temporary and permanent injunctive relief.[2] Specifically, the Operatives asked the trial court to grant the following relief:

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[2] The Board of Operatives had previously filed a complaint on February 2, 1985, seeking a temporary restraining order and various forms of injunctive and declaratory relief. On February 21, 1985, the trial court entered a consent order indicating that, as to the matters in which the Operatives sought preliminary injunctive relief, the parties had reached an agreement obviating the necessity for any further consideration thereon. Based on that agreement, the court ordered that no preliminary injunction shall issue. Except for the denial of Management's motion to strike the February 2 complaint and their subsequent answer to that complaint, nothing further transpired in the case until the Operatives filed their September 16, 1985, motion for a temporary restraining order and injunctive relief. It is from the order denying this September 16 motion that the Operatives appeal.

"23. Immediately issue a temporary restraining order against the defendants Farlow, Green, Doughty, Bragdon and Langner providing as following:

"(a) Restraining the said defendants from requiring the plaintiffs to obtain permission to leave the Acipco premises to consult with the attorney for the Board of Operatives and from imposing reprimands or any other form of discipline in connection therewith;

"(b) Directing the immediate removal of the reprimand of 3 September from the record of plaintiff Adams;

"(c) Restraining the defendants from enforcing the provisions of the 3 September letter from the defendant Langner to the Board of Operatives and directing that the Board of Operatives shall have the right to meet at the call of its chairman and to perform necessary board business without permission from any other persons and that the members of the Board of Operatives shall be paid for all time spent in attending such meetings and board business;

"(d) Restraining the defendants from interfering with the plaintiffs or any of them acting to perform the full and complete requirements of the resolution adopted at the 27 August meeting of the Board of Trustees or imposing or attempting to impose any discipline on any of the plaintiffs acting in accordance with such resolution;

"(e) Restraining the defendants from imposing on the plaintiffs any restrictions or limitations not imposed in practice prior to 3 September 1985;

"(f) Restraining the defendants from disciplining,

harassing or intimidating the plaintiffs until further order of this Court;

"(g) Restraining the defendants from violating their duties as trustees of the Eagan Trust to act solely in accordance with the law of Alabama in protesting or challenging the conduct of the plaintiffs as trustees of the Eagan Trust in the management and control of Acipco.

". . . .

"25. Issuing a permanent injunction in accordance with the foregoing upon a hearing on the merits."

By an order dated September 17, 1985, the trial court denied the Operatives' request for a temporary restraining order. Following a ten-day trail and the submission of briefs by both parties, the trial court entered a rather lengthy order on December 6, 1985, denying the Operatives' motion for *preliminary injunction*.[3] It is from this order that the Operatives appeal.

In *Howell Pipeline Co. v. Terra Resources, Inc.*, 454 So.2d 1353, 1356 (Ala. 1984), this Court set out a three-pronged test by which the trial court can review an application for a preliminary injunction:

"1. '. . . if [the trial judge] finds that the party has presented a fair question as to the existence of the

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[3] By its order, the trial court denied only the Operatives' motion for preliminary injunction, apparently reserving their request for permanent injunctive relief for consideration at a later date.

right to be protected, and further finds that temporary interference to preserve the status quo is convenient and expedient, then he may exercise his discretion and grant the injunction.'

"2. '. . . An injunction should not be granted unless it is necessary to prevent irreparable injury.'

"3. 'Injunctions . . . will not be granted merely to allay apprehension of injury; the injury must be both imminent and irreparable in a court of law.'

"*Double C. Productions, Inc. v. Exposition Enterprises*, 404 So.2d 52, 54 (Ala. 1981). 'In measuring the relief sought by a complainant against this standard, the trial court, then, in its discretion and under the individual facts and circumstances of each case, "... may consider and weigh the relative degree of injury or benefit to the respective parties ...."' *Id., citing Valley Heating, Cooling and Electric Company v. Alabama Gas Corporation*, 286 Ala. [79] at 82, 237 So.2d [470] at 472 [(1970)]."

Additionally, as recently recognized by this Court in *Marshall Durbin & Co. of Jasper, Inc. v. Jasper Utilities Board*, 483 So.2d 399, 400 (Ala. 1986):

"Equally important is the proposition stated by this Court in *Alabama Education Association v. Board of Trustees of the University of Alabama*, 374 So.2d 258 (Ala. 1979):

"'Furthermore, the law in this State is settled that, on a motion for preliminary injunction, the burden is on complainant to satisfy the court that there is at least a reasonable probability of ultimate success on

> the merits of the controversy. *Postal Telegraph v. City of Mobile*, 179 F. 955 (C.C.S.D.Ala. 1909).'
>
> 374 So.2d at 261."

A party appealing from the grant or denial of a motion for a preliminary injunction also bears a heavy burden because a trial court's decision to grant or deny a motion seeking a preliminary injunction will not be disturbed on appeal, absent a gross abuse of discretion. *Marshall Durbin & Co. of Jasper, Inc., supra; Howell Pipeline Co., supra.* This gross abuse of discretion must be such as to result in manifest injustice unless this Court sets aside the trial court's order.

Having reviewed the record in this case, along with the respective briefs and arguments of counsel for both sets of parties, we cannot say the trial court grossly abused its discretion in denying the Operatives' request for preliminary injunctive relief. Indeed, as to the "permission to leave rule" issue, the "removal of the reprimand" issue, and the "approval of overtime pay for special Operatives' meetings" issue, we agree with and hereby adopt the order of the trial court:

> "1. The Plaintiffs seek to restrain the Defendants from requiring the Plaintiffs to obtain permission to lave the Acipco premises to consult with the attorney for the Board of Operatives and from imposing reprimands or any form of discipline in connection therewith.
>
> "The evidence has shown that since at least December 7, 1984, the Plaintiffs have been seeking and requesting permission prior to their leaving the

plant premises during their working hours to consult with the Board of Operatives' attorney. Until the incident involving Leland C. Adams, Jr. resulting in a written reprimand to him on September 3, 1985, (discussed later herein), the evidence shows that the Plaintiffs had suffered no difficulty, injury or damage as a result of following the permission procedure. There has been no evidence presented that any of the Plaintiffs have been denied permission to leave the plant premises to consult with their attorney on Board of Operatives business or that any of the Defendants have ever demanded to know or tried to learn the reasons it was necessary for the Plaintiffs, or any of them, to meet with their attorney at a particular time. To the contrary, the evidence has shown that Plant Rule 12 . . . has been in existence for many years and that the evidence has failed to show that it has been applied unfairly or more restrictively to the Plaintiffs than any other wage employee.

"2. The Plaintiffs seek the Court to mandatorily direct the immediate removal of the written reprimand of September 3, 1985, from the record of Plaintiff Leland C. Adams, Jr.

"Whether Adams has shown a fair question to raise as to the existence of a right to relief is borderline and doubtful; however, it is clear and the Court so finds and concludes that Adams has failed to show that he has or is likely to suffer immediate and irreparable injury unless the Defendants are mandatorily ordered to remove by preliminary injunction the reprimand given him on September 3, 1985. The evidence shows that Adams had previously been cited for leaving the plant premises without permission from an authorized person and received reprimand for such conduct. The evidence shows now that Adams has again been

cited for the same violation of the plant rules and has again been reprimanded. Pursuant to the plant rules, Adams could have been fired on either occasion but such has not been the result. At most, Adams has only shown an apprehension of injury and a speculation as to the consequences of future actions by the Defendants.

"3. The Plaintiffs seek to restrain the Defendants from enforcing the provisions of a letter dated September 3, 1985, of Defendant E. E. Langner, Jr. to the members of the Board of Operatives. This letter states in pertinent part that,

> "' Board members will be compensated for time that they are required by the Company to attend committee meetings and investigations, as well as for the regular meeting of the Board on the first Monday of each month whether during regular working hours or not. Pay for special Board meetings not held during regular working hours must be authorized by the Works Manager's office.'"

> "The Plaintiffs seek the Court's mandatory order preliminary that the Board of Operatives shall have the right to meet at the call of its chairman and to perform necessary Board business without permission from any person and that the members of the Board of Operatives shall be paid for all time spent in attending such meetings. The evidence shows that this claim apparently seeks the result that one or more of the Plaintiffs, as members of the Board of Operatives, be paid overtime for any special Board meetings called and held at a time that the Board member or members

> are not on duty during their regular shift or working hours and to further be paid overtime at any time an individual Board member considers it necessary to perform necessary Board business during times not during regular working hours.
>
> "The letter and policy complained of clearly applies only to overtime compensation of Board members for attending special meetings of the Board of Operatives and does not attempt to or purport to regulate or control when the Board of Operatives may choose to meet. Neither has there been any evidence presented that any of the Defendants attempted to dictate or interfere with the right to hold such meetings or the timing of them."

As to the Operatives' request that Management be restrained from interfering with the Operatives' attempts to implement the contract labor resolution passed on August 27, 1985 (quoted *supra*), we agree with the trial court that the Operatives are not entitled to the issuance of a preliminary injunction as to this matter because they have failed to establish that imminent and irreparable injury will result if the injunction is not issued. However, we do not agree that this claim "fails to show a fair question to raise as to the existence of a right to relief," which is, nevertheless, only one of several factors to be considered. In the portion of its order dealing with the resolution, the trial court stated the following:

> "The resolution has been shown to be of doubtful validity. It was adopted by some of the trustees

> comprising only one voting unit of the trust, to-wit, the members of the Board of Operatives. This procedure is not authorized by the codicil creating the trust or the by-laws of the company. *The evidence shows that the purported meeting of the Board of Trustees was not properly called or noticed.* Further, that the action taken by the trustees present at the meeting held on August 27, 1985, and now sought to be sanctioned by this Court, was outside of the stated purpose set forth in the defective notice of the meeting. It is further clear that the subject matter of the resolution is beyond the power and authority of the trustees and an invasion of the management prerogatives of the Board of Directors of the company or possibly the prerogatives properly exercised by the stockholders of the company."

(Emphasis added.) Based on our reading of the clear language of Article VII, Section 3, setting forth the procedure for calling a special trustees meeting, we cannot agree with the trial court's preliminary finding that the meeting was not properly called. However, the error of this preliminary finding by the trial court does not compel reversal because of the narrow issue here presented.[4]

Management argues that Article VII, Section 3, requires

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[4] We recognize that the validity vel non of the resolution has not been determined, as a matter of law, by this order denying the Operatives' request for preliminary injunctive relief, and that its validity will be determined by a trial on the merits of the Operatives' request for a permanent injunction. Nevertheless, because the parties argue this preliminary finding by the trial court, among others, we deem it appropriate to address the proper construction of this specific provision setting out the procedure for calling a special trustees meeting.

that when the chairman of the Board of trustees refuses to call a special meeting, as he did in the present case, a majority of either board must submit to the vice chairman a *written request* to call a special meeting, upon which he must refuse or fail to act before a majority of that board may call the meeting themselves. This construction of Section 3 does not comport with the plain language of that provision. As the following pertinent sentences make clear, resort to the vice chairman by a majority of either board is required only in the *absence* of the chairman or his *inability* to act:

> "The call shall be made by the Secretary, at the instance of the Chairman, *or, in his absence or inability to act*, at the instance of the Vice Chairman. In the event that the Chairman should refuse or fail, [*or in his absence or inability to act*, the Vice Chairman should be absent, or refuse or fail upon written request of a majority of the members of either the Board of Operatives or the Board of Management to make the call], then the meeting may be called at the instance of a majority of the members of either of said Boards."

(Brackets and emphasis added.) The bracketed portion of the second sentence above is sub-disjunctive; that is, applicable only in the event of the second contingency expressed, *viz.*, the chairman's absence or inability to act. Thus, in the present case, where the chairman refused, it was unnecessary for a majority of the Operatives to submit *to the vice chairman* a written request to call a special meeting before they could make the call themselves.

We reserve opinion as to the correctness of the other

preliminary "findings" of the trial court with the respect to the validity of the resolution passed by the Operatives in their capacity as the board of trustees. The evidence on these issues should be fully developed upon a consideration of the merits of the Operatives' compliant seeking a preliminary injunction.

Based on the foregoing, the order of the trial court denying the Operatives' motion for preliminary injunction is due to be affirmed.

II. *85-448 Adams v. ACIPCo*

This case, also an appeal from the denial of a motion for preliminary injunction, involves the validity of the actions taken at a December 4, 1985, meeting of the ACIPCo Board of Directors. Underlying the Operatives' attack on the validity of those actions is their contention that the board of directors was improperly constituted on December 4, 1985, and, therefore, that any actions taken by the board during the directors' meeting held that day were without force and effect.

Because the proper composition of the ACIPCo board of directors, both in number and respective positions, is at the heart of the factual inquiry in this case, we set out below the pertinent provisions of the ACIPCo by-laws regarding the number of directors as well as the provisions pertaining to the various seats on the board:

"ARTICLE IV

"Directors

"Section 1:

"*The Board of Directors shall consist of not less than twelve nor more than seventeen members.* The Directors shall be elected by the holders of the common stock at the annual stockholders' meeting. Vacancies occurring in the Board of Directors between the annual meetings shall be filled only by the common stockholders.

". . . .

"Section 5:

"A majority of the members of the Board of Directors shall constitute a quorum. . . .

". . . .

"ARTICLE VII

"Board of Trustees

". . . .

"Section 14:

"All shares of common stock of American Cast Iron Pipe Company owned by this Board of Trustees shall be voted at the election of Directors of American Cast Iron Pipe Company as follows:

"Not less than five nor more than seven Directors who shall be members of the Board of Management of the Company;

"Two Directors who shall be the members of the Board of Operatives;

"One Director who shall be a member of the clerical force of the Company;

"One Director who shall be an employee from the Company organization at large;

"One Director who is neither an officer nor an employee of the Company, but who shall be selected as one who can fairly represent invested capital;

"One Director who is neither an officer nor an employee of the Company, but who shall be selected as one who can fairly represent the buying public;

"One Director who is neither an officer nor an employee of the Company, but who shall be selected as one who can fairly represent the religious, social and educational life of the country; and

"In addition, the Board of Trustees may elect three additional Directors as hereinafter provided:

"....

"In determining the persons for whom said shares of the common stock shall be voted for the remaining Directors, the Board of Management shall cast one vote and the Board of Operatives shall cast one vote, and should said votes not be voted for the same person, then the question in dispute shall be referred to the Board of Directors as provided in Section 12 of this article.

"Should the Board of Directors of the Company elect one of its members to function exclusively as Chairman of the Board of Directors, then said shares of common stock shall be voted for said

person for the fifteenth Director of the Company.

"Should the Board of Directors of the Company elect one of its members to function exclusively as Technical Director, then said shares of the common stock shall be voted for said person as the sixteenth Director of the Company.

"The fifteenth Director shall not be elected unless the Board of Directors shall elect one of its members as Chairman of the Board of Directors, and the sixteenth Director shall not be elected unless the Board of Directors shall elect one of its members as a Technical Director.

"If the by-laws of the Company permit, there may be elected a Director in addition to those above provided, who shall be the seventeenth Director."

(Emphasis added.)

The recent history of the composition of the ACIPCo board of directors, including the facts pertinent to this controversy, is undisputed and is set out by the trial court in its order, which we incorporate with additional facts:

"The evidence has shown that at the annual meeting of the stockholders of ACIPCO on January 29, 1982, Carl P. Farlow, Paul W. Green, Richard M. Bragdon, S. F. Carter, J. G. Foshee, Harvey Henley, J. A. Sloan, H. L. Brown, Dr. C. C. Fargason, W. E. Snow, Allen Post, W. R. Eagan, and John M. Harbert, III, were unanimously elected as the directors of ACIPCO. [At this January 29 meeting, W. E. Snow was also elected to the position of Technical Director.] Subsequent to that meeting, E. E. Langner was elected to replace S. F. Carter, Nick Johnson

was elected to replace Harvey Henley, and J. A. Bragan was elected to replace H. L. Brown. The annual meeting of the Board of Trustees and the annual meeting of the stockholders for 1983 were adjourned for lack of a quorum, in that the Board of Operatives as one of the joint trustees and one of the stockholders did not attend either of said meetings. At the annual meeting of the stockholders on January 23, 1984, the Stockholders [including the Operatives] unanimously reelected as directors C. P. Farlow, P. W. Green, R. M. Bragdon, S. F. Carter, J. P. Doughty, Nick Johnson, J. A. Sloan, J. A. Bragan and W. E. Snow. Dr. C. C. Fargason, Allen Post, W. R. Eagan and John M. Harbert, III carried over and continued to serve as directors. At the annual meeting of the stockholders on January 29, 1985, no one was elected to fill any position as a director, and all of the directors carried over and continued to serve and act as directors. In February, 1985, Dr. C. C. Fargason, who had been serving as the director who was an employee from the company organization at large, retired and therefore ceased to be a director.

". . . .

"At a called meeting between the Board of Management and the Board of Operatives on November 15, 1985, Mr. Farlow advised the Board of Operatives that at the regular meeting of the Board of Directors scheduled for December 4, 1985, he planned to offer his resignation as President of the Company, to recommend Mr. Green be elected President of the Company and that he hoped that the Board would elect him as Chairman of the Board to continue until his retirement at age 65 in May 1986. At the December 4, 1985 regular meeting of the Board of Directors, plaintiffs Johnson and Sloan were present and defendants Farlow, Green, Doughty,

> Bragdon, Langner, Harbert, Bragan, Snow and Eagan were present, with defendant Post being absent."

Thus, eleven directors were in attendance at the December 4 meeting. The action taken by the board at that meeting included the following:

Harbert, after routine business, moved that Farlow be elected to serve exclusively as chairman of the board of directors. All of the directors other than Farlow, Johnson, and Sloan voted in favor of the resolution. Johnson and Sloan, the two directors from the Operatives, voted against it, and Farlow abstained. There were thus eight votes in favor.

Farlow then submitted a written resignation as president of ACIPCo, which stated: "I hereby resign as President of the American Cast Iron Pipe Company effective immediately." It was unanimously accepted.

Harbert then moved that P. W. Green be elected president and chief executive officer of the company. The motion was seconded and all present voted in favor of the resolution except Sloan and Johnson, who voted against, and Green, who abstained. There were thus eight votes in favor. Green then submitted his resignation, which read: "I hereby resign as Vice President and Sales Manager and Secretary of American Cast Iron Pipe Company effective immediately." The resignation was unanimously accepted by the Board of Directors.

Harbert then moved to elect Richard Bragdon as secretary of ACIPCo, the motion was seconded, and all present voted in favor, except Johnson and Sloan, who voted against, and

Bragdon, who abstained. There were thus eight votes in favor.

Another motion was made, seconded, and adopted by a vote of all present, except Sloan and Johnson, who voted against it, that Green as president of ACIPCo be appointed attorney in fact and agent of ACIPCo to vote all of the shares of capital stock owned by ACIPCo in its wholly-owned subsidiaries, American Valve & Hydrant Manufacturing Company, Specification Rubber Products, Inc., and Kristin Shipping Company.

On December 9, 1985, five days after the above board of directors meeting, the Operatives filed their complaint seeking a temporary restraining order, preliminary and final injunctive relief, and a declatory judgment. The Operatives' requests for numerous and specific forms of relief were based on their underlying contentions that the December 4 directors' meeting, and the actions taken therein, were invalid in that the board was improperly constituted, that the number of directors had fallen below the minimum stated in the by-laws, that directors Farlow, Green, and Bragdon were disqualified by reason of interest, that a quorum was not present, and that the action taken was not done by a vote of the majority of the board as required by the by-laws. By their complaint, the Operatives requested the following specific relief:

> "(a) Declare the purported election of Farlow to serve exclusively as Chairman of the Board of Directors to be invalid. Declare the resignation of Farlow as president effective and declare that Farlow is not an employee of ACIPCO, a beneficiary of the Eagan Trust, a member of the ACIPCO Board of

Directors, Board of Management or Board of Trustees;

"(b) Temporarily restrain and subsequently enjoin the defendant Farlow from acting or purporting to act in any capacity as a director of Chairman of the Board of Directors of ACIPCO, as a member of the Board of Management or the Board of Trustees of ACIPCO, as an employee of ACIPCO or as a beneficiary of the Eagan Trust and from receiving any pay, salary or compensation in any form from ACIPCO;

"(c) Declare the purported election of Green as president of ACIPCO invalid. Declare the resignation of Green as vice president and sales manager effective and declare that Green is not a director, an employee, a member of the Board of Management of ACIPCO or a member of the Board of Trustees of the Eagan Trust, a beneficiary of the Eagan Trust;

"(d) Temporarily restrain and subsequently enjoin the defendant Green from taking any action or purporting to take any action as president, vice president and sales manager, director, member of the Board of Management, member of the Board of Trustees or employee of ACIPCO and prohibiting the said Green from receiving any salary, payment, or compensation of any kind from ACIPCO;

"(e) Immediately restrain and subsequently enjoin the defendant Bragdon from any action taken or purported to be taken as secretary of ACIPCO or any of its boards or any board or governing body of the Eagan Trust;

"(f) Immediately restrain and subsequently enjoin the treasurer of ACIPCO, Mr. Doughty, from making any monetary payments as salary or com-

pensation of any kind to Mr. Farlow or Mr. Green;

"(g) Declaring that W. E. Snow was improperly elected as a director of ACIPCO in that he was elected as the 'technical director' in violation of the ACIPCO By-Laws, Article VII, Section 14;

"(h) Immediately restraining and subsequently enjoining the defendant Snow from acting in any manner whatsoever as a director of ACIPCO.

"(i) Declare that Van. L. Richey has not been validly appointed as sales manager of ACIPCO and that his name has been improperly certified to the Board of Trustees, all as required by the ACIPCO By-Laws;

"(j) Immediately restrain and subsequently enjoin the meeting of the Board of Trustees now set for December 10, 1985, under the invalid call thereof as set out in Exhibit 'D';

"(k) Declare invalid the resolution which purported to appoint Mr. Green as the lawful attorney and agent of ACIPCO in voting the stock of all three subsidiaries of ACIPCO;

"(l) Declare that the Board of Directors of ACIPCO is improperly constituted following in the retirement of C. C. Fargason, the resignation of Farlow as president of ACIPCO and the resignation of Green, or any of the foregoing, in that after each such event it then consisted of less than twelve directors, the minimum required by the ACIPCO By-laws to constitute a Board of Directors empowered to act, and immediately restrain and thereafter enjoin the Board of Directors of ACIPCO from acting in any manner on any matter except to adjourn unless and until its membership is increased to twelve or more by the election of additional directors by the stock-

holders of ACIPCO;

"(m) Immediately restrain and subsequently enjoin the ACIPCO Board of Directors from acting in any manner on any matter except voting to adjourn unless and until the number of validity elected directors is increased by a vote of the stockholders to a minimum of twelve;

"(n) Declare that the Board of Management of ACIPCO is not authorized to act as the executive committee of the Board of Directors unless and until the minimum number of validly elected directors equals at least twelve and until the membership of the Board of Management is increased to a minimum of five in accordance with the ACIPCO By-laws.

"(o) Immediately restrain the ACIPCO Board of Management and the individual members thereof from acting in any manner, as the executive committee of the Board of Directors of ACIPCO and as a Trustee of the Eagan Trust until further order of this Court;

"(p) Setting this cause for hearing on the issuance of a preliminary injunction and, upon hearing of the same, issuing a permanent injunction;

"(q) Issuing a permanent injunction in accordance with the foregoing upon a hearing upon the merits; . . ."

By an order entered on December 10, 1985, the trial court denied the Operatives' request for a temporary restraining order, and on January 14, 1986, the trial court entered another order denying their request for a preliminary injunction. In

support of its decision to deny the preliminary injunction, the trial court made the following preliminary findings:

> "The evidence shows that it has been the practice over a great many years to elect a person to [a] director position to serve as Technical Director, even though the position of director designated by a lower number that that for the Technical Director [sixteenth] was not filled. The Court finds and concludes that the use of the numbering system in the ACIPCO By-laws is merely for designation purposes, such as using place numbers in electing various political offices, and therefore it is not necessary to elect someone to all of the director positions that precede the designation of a numbered director.
>
> ". . . .
>
> ". . . The plaintiffs contend that [the December 4, 1985 directors'] meeting and the actions taken therein, were invalid in that the Board was improperly constituted, the number of directors had fallen below the minimum stated in the by-laws, at the least directors Farlow, Green and Bragdon were disqualified by reason of interest, and the action taken was not present, and the action taken was not done by a vote of the majority of the Board as required by the by-laws.
>
> "A Board of Directors may continue to transact the business of the corporation even though the number of directors is reduced below the minimum required by the by-laws provided that the number of directors does not fall below a quorum. Nevertheless, in this situation there were thirteen authorized directors of ACIPCO, and since Dr. Fargason's retirement, there have been twelve acting direc-

tors, which is the minimum number stated in the by-laws. Thus, with eleven directors present. Although there are situations where a director may be disqualified from voting by reason of personal pecuniary interests, this was not the case here. Defendants Farlow, Green, and Bragdon were not disqualified and could have voted for themselves. Even if Mr. Farlow had been disqualified from voting for himself, and Mr. Green had been disqualified from voting for himself, and Mr. Bragdon had been disqualified from voting for himself, each of them still received more votes than a majority of the then authorized directors.

"The Court finds and concluded that on December 4, 1985, the Board of Directors of ACIPCO was properly constituted, could transact business on behalf of the Company, a quorum, was present at the meeting on said date, and the actions taken at said meeting were validly approved by a majority of the Board of Directors.

"The party seeking a preliminary injunction must show a fair question as to the existence of a right to be protected; that temporary interference to preserve the status quo is convenient and expedient; and that the injury must be both imminent and irreparable in a court of law. In applying these standards, the Court weighs the relative hardships that either party may suffer against any benefits which might flow from the grant of the preliminary injunction. *John Lloyd & Co., Inc. v. Stringer*, 456 So.2d 1076 (Ala. 1984); *Howell Pipeline Company v. Terra Resources*, 454 So.2d 1353 (Ala. 1984); *Watts v. Victory*, 333 So.2d 560 ([Ala.] 1976). The Court finds and concluded that the plaintiffs have failed to show a fair question as to the existence of a right to relief. The Court further finds and concludes that the plaintiffs have failed to show that they will

> suffer immediate and irreparable injury or damage unless preliminary injunctive relief is granted. Should injunctive relief be granted as sought in this motion, ACIPCO and the other defendants would suffer great injury and hardship or the likelihood of injury and hardship than would be sustained by plaintiffs.
>
> "Based upon these matters, the Court finds and concluded that the motion of the plaintiffs for a preliminary [in]junction is due to be denied."

It is from the above order that the Operatives appeal.

As stated, supra, in appeal 85-300, a party appealing from the denial of a motion for preliminary injunctive relief has the burden of showing that in denying that motion, the trial court grossly abused its discretion. This the Operatives have not done. What they have done is argue legal issues that bear strictly on the merits of the Operatives' claims. The Operatives open the argument portion of their brief in this appeal by stating the question for review thusly:

> "The question before the Court in Case N. 85-448 is whether or not the December 4, 1985 meeting of the ACIPCO Board of Directors was conducted in accordance with the requirements of the ACIPCO By-laws and the applicable laws so that the acts and things done at that meeting, specifically, the election of Mr. Carl P. Farlow to serve exclusively as chairman of the Board of Directors, P. W. Green to serve as president and chief executive officer of ACIPCO and Richard Bragdon to serve as secretary of ACIPCO were valid actions. . . ."

The above statement, we respectfully note, is not a correct

assessment of the question presented to this Court by this appeal. At the conclusion of their argument in this case, the Operatives ask this Court to:

> "reverse this trial court and direct the trial court on remand to declare that the Board of Directors of ACIPCO is improperly constituted, declare the elections of Messrs. Farlow, Green and Bragdon invalid, declare Messrs. Farlow and Green have resigned from the Board of Management and consequently the Board of Directors of ACIPCO, appoint some entity to function in control of ACIPCO on an interim basis and immediately provide for the selection of additional directors in accordance with the principles of the Eagan Trust."

From our review of the record in this case, however, it appears that the Operatives have not yet been denied, on the merits, their requests for declaratory and permanent affirmative injunctive relief. While the trial court made certain preliminary findings, it did so only upon consideration of the Operatives' motion for *preliminary injunctive relief;* by express language in the trail court's order, only that portion of the Operatives' requested relief was denied. Thus, the merits of the legal issues argued by the Operatives are not yet ripe for review.

We recognize that by their arguments, the Operatives are attempting to establish an erroneous the trial court's finding that they "have failed to show a fair question as to the existence of a right to relief." However, this factor is but one of three that the trial court must consider in deciding whether to grant or deny a request for preliminary injunctive relief. Having reviewed the record in this case and having considered the

arguments made by each side, we conclude that the Operatives have failed to establish that the trial court's denial of their request for a preliminary injunction amounted to a gross abuse of discretion.

The trial court's preliminary findings comport with a reasonable reading of the ACIPCO by-laws as they pertain to the composition and election of the board of directors and the circumstances under which that board is empowered to act. Furthermore, the evidence in this case supports the trial court's finding that denying the Operatives' motion for a preliminary injunction would not result in imminent and irreparable injury to the Operatives. *The Operatives fail to point to any evidence of record that can establish the imminent and irreparable harm they will suffer as a consequence of the denial of their preliminary injunction motion*, other then their allegation that Management will continue to have unbridled control over ACIPCo, the entire res of the Eagan trust. Moreover, the record clearly supports the trial court's finding that, in weighing the relative degree of injury or benefit to the respective parties, "ACIPCO and the other defendants would suffer greater injury and hardship than would be sustained by plaintiffs [Operatives]." See *Double C. Productions, Inc. v. Exposition Enterprises*, 404 So.2d 52 (Ala. 1981).

To preliminary grant the relief requested by the Operatives would require a complete dismantling of the ACIPCo board of directors, divesting its member of all power, thereby drawing into question the validity of the actions already taken by that Board. It would further leave the company without a presi-

dent, a secretary, or a sales manager. The effect of granting the Operatives' relief preliminarily could have far-reaching consequences in terms of the vital, day-to-day operations of the company. Clearly then, maintenance of the status quo, pending a *final determination* of the Operatives' claims, on the merits, is the least injurious to ACIPCo itself and those who benefit from its uninterrupted operation, and, supposedly, the protection and preservation of ACIPCo is the aim of each of the respective parties. The status quo in this case is preserved by *not* granting the Operatives' motion for preliminary affirmative injunctive relief.

It bears repeating that the issued before us here is the correctness of the order denying the preliminary injunction; "we are not reviewing a final judgement on a hearing of the case on its merits." *Howell Pipeline Co. v. Terra Resources, supra,*454 So.2d at 1358. We hold that the trial court did not abuse its discretion in refusing to grant the Operatives' request for a preliminary injunction. Therefore, the judgment below is due to be affirmed.

III. *85-888 Adams v. ACIPCo*

At the outset, we note that Management has filed motions to strike the Operatives' brief and reply brief and to dismiss the appeal in this case. The grounds alleged concern the inclusion by the Operatives of quotes from and references to the affidavit of James Whitehead, which was not included in the record of this appeal. After filing their brief with this Court, the Operatives filed a motion in the trial court to correct and

supplement the record in this case to include the Whitehead affidavit. Following a hearing, the trial court denied the Operatives' motion. For that reason, Management's motion to strike is due to be granted, but only as to that portion of the Operatives' briefs in which references to or quotes from the Whitehead affidavit are made.

On January 27, 1986, the Operatives and Management, as trustees, met for the annual meeting of the ACIPCo board of trustees. At this meeting, the respective boards cast their collective vote for or against a slate of individuals nominated for positions on the ACIPCo board of directors. Management nominated and voted in favor of each of the following persons: P.W. Green, president; V. L. Richey, sales manager; R. M. Bragdon, vice president in charge of engineering; E. E. Langner, vice president and works manager; J. P. Doughty, treasurer; Nick Johnson, a member of the Operatives; James Sloan, a member of the Operatives; J. A. Bragan, a member of the clerical forces of the company; Dr. J. W. Reid, an employee from the company at large; C. P. Farlow, chairman of the board of directors; and W. E. Snow, technical director. Each of these persons was an officer or employee of the company. Except for Nick Johnson, James Sloan, and J. A. Bragan, the Operatives voted against each of these persons.

Management nominated and voted in favor of John M. Herbert III, chairman of the board of the Herbert Corporation, to be the director to represent the buying public, and W. R. Eagan, the son of John J. Eagan, to be the director to represent the religious, social and educational life of the country.

Operatives voted against Herbert and Eagan.

Management also nominated Dr. Thomas A. Bartlett, chancellor of the University of Alabama System, and Wallace D. Malone, Jr., chairman and chief executive officer of Southtrust Corporation, to be outside directors of the company. Operatives voted against both of these men. Because the Operatives and Management failed to agree on all of the individuals nominated to the board of directors, pursuant to the following provision in the rules and regulations of the board of trustees found in Section 12 of Article VII of the ACIPCo by-laws, Management directed R. M. Bragdon, as secretary of the board of trustees, to refer the questions in dispute regarding the election of directors to the board of directors for final decision:

> ". . . In the event the two units of the Board of Trustees shall fail to agree upon any question, then said question in dispute may be referred to the Board of Directors, whose decision on said question in dispute shall be final. Either the Board of Management or the Board of Operatives may direct the Secretary of the Board of Trustees to refer said question to the Board of Directors. The Secretary shall make such reference in writing. Any Meeting of the members of the Board of Directors held for the purpose of deciding a question in dispute between the two units shall be presided over by an attorney authorized to practice law in Birmingham, Alabama, who is not a member of either the Board the Board of Operatives or the Board of Management. Such presiding officer shall be paid a reasonable fee for his services. He shall be appointed by the presiding judge of the court

> having jurisdiction over this trust, which court is at the present time the Circuit Court of the Tenth Judicial Circuit of Alabama."

By letter dated January 30, 1986, directed to all of the ACIPCo directors, Bragdon referred the election questions to the directors for final decision.

Although the Operatives contend that, besides those referred by Management to the board of directors, disputes over additional questions arose at the January 27, 1980, board of trustees meeting (and thus the list of those referred by Management to the directors for final decision was incomplete), there is nothing in the record indicating that the Operatives sought to refer those questions themselves, even though the above-quoted provision gives "[e]either the Board of Management or the Board of Operatives" the right to direct the secretary to refer a disputed question to the directors.

In further pursuance of the above-quoted provision of the ACIPCo by-laws, Management filed its petition with "the presiding judge of the court having jurisdiction over this trust," seeking the appointment of "an attorney authorized to practice law in Birmingham, Alabama, who is not a member of either the Board of Operatives or the Board of Management," to preside over "[a]ny meeting of the members of the Board of Directors held for the purpose of deciding" the election questions in dispute referred to the directors by Management. Following the mandate of this Court's decision in *Ex parte Nick Johnson*, 481 So.2d 353, 358 (Ala. 1985), Management made the Operatives parties to the proceeding, giving them "notice and

an opportunity to appear and participate in the appointment of an attorney provided for in such Rules and Regulations."

At the first scheduled hearing on the petition for appointment on March 10, 1986, the Operatives appeared and filed three motions: a motion to stay, a motion to dismiss, and a motion for summary judgment. The motions to stay and dismiss were denied, and the hearing on the petition for appointment was continued. Following a hearing on April 18, 1986, Judge John N. Bryan, Jr., the presiding judge of the Tenth Judicial Circuit, entered an order dated April 22, 1986 appointing the Honorable J. N. Holt to preside over the ACIPCo board of directors meeting to decide the questions in dispute which had been referred to them. As an aid in understanding the posture of this appeal, Judge Bryan's order is set out in its entirety below:

"ORDER OF APPOINTMENT

"This matter is once again before the undersigned, as the presiding judge of the Tenth Judicial Circuit of Alabama, for the appointment of an attorney to preside over a meeting of the Board of Directors of American Cast Iron Pipe Company.

"The respondents have raised a number of issues. These issues will not be set out as the respondents have been granted time to advance such issues by the various pleadings, depositions, and by arguments of counsel with a court reporter present. There is, therefore, an adequate record, and only brief comment will be made as to certain issues to clarify the ruling hereinafter made.

"Able counsel for the respondents argued that the Supreme Court ruled in *Ex parte: Nick Johnson, et al*, 418 So.2d 353 (1985), that the undersigned, as presiding judge of this circuit, is vested with complete jurisdiction as to all issues between the parties. The respondents take the position that once this pending petition was filed in the clerk's office and given a case action number it took the status of any other civil court action.

"I do not agree with this contention by the respondents and do not believe that to be the ruling or intent of the Supreme Court in its ruling in *Ex parte Nick Johnson, et al.* The filing of such petition and assignment of a case action number serves only to index this matter and make a permanent record, as well as a record for examination by state auditors. The undersigned, in his capacity and office of presiding judge of this circuit, is designated to be the person to make appointment of an attorney in the event of a dispute requiring action by the Board of Directors. The undersigned perceives his duty and obligations under the court order of April 6, 1942, in the case of *W. D. Moore, et al. vs. Kyle Hardin, et al., Case No. 53715*, in the Circuit Court of the Tenth Judicial Circuit of Alabama, Equity Division, to be:

"Upon receipt of a petition to appoint attorney to preside over a meeting of the Board of Directors of American Cast Iron Pipe Company, with due notice being given to the respondents of such petition, to set same for hearing. At such hearing, said respondents to be granted the right to participate and the right to be heard on who would be appointed as the attorney to preside over the meeting of the said Board of Directors. I view this to be the sole duty and obligation placed on the undersigned in his capacity and office of presiding judge of this circuit. I still view my function to be principally a

ministerial duty coupled with a judicial duty to see that notice of the petition and hearing on said petition be given to each of the party respondents.

"All party respondents have been duly served and hearings conducted. The respondents have been allowed to file various motions, take depositions, and present arguments to the court with a court reporter present. This was done to allow the respondents to make such record as they desired. All motions so filed by the respondents are deemed overruled as not being proper to be considered by the undersigned for ruling.

The respondents have at no time argued or presented evidence that no dispute in fact existed between the Board of Management or the Board of Operatives or that said question was not properly referred to the Board of Directors. The attorney for the respondents stated in his arguments before a court reporter that the respondents had no objection to the appointment of Mr. J. N. Holt, if such appointment was to be made. Respondents' counsel was very candid in his statement that their objection was directed to any appointment being made, but that they specifically had no objection to Mr. J. N. Holt.

"I can reach no other conclusion but that once a petition for appointment of counsel is received, with proper party respondents, due notice given, and hearing conducted, but to comply with the mandate of the 1942 court ruling directing the appointment of an attorney to preside over the meeting of the Board of Directors.

"The 1942 ruling, in my opinion, did not place jurisdiction of all issues between the parties before the presiding judge of this circuit. There is now at this time pending a Rule 60(b) motion in the original *Moore vs. Hardin* case. This Rule 60(b) motion was filed by the respondents and is pres-

ently before Judge Marvin Cherner in the Equity Division of this circuit. In fact, the respondents sought injunctive relief from that court asking that the undersigned be enjoined from acting on this pending petition. Said injunctive relief was denied. *Without question, Judge Cherner has jurisdiction as to the issues raised by the respondents before the undersigned and Judge Cherner can certainly stay any act of the Board of Directors pending ruling on the said 60(b) motion.*

"I find my duty to be clear under the 1942 decree. Until such time as that decree is modified or the Supreme Court orders otherwise, I find . . . my jurisdiction, if such is the proper connotation, to be limited to the act of appointment of an attorney to preside over the meeting of the Board of Directors when proper petition is presented for such action.

"The petition having been considered... is this date granted. The Honorable J. N. holt is this date appointed to preside over the meeting of the Board of Directors of American Cast Iron Pipe Company. Said appointment shall remain in effect for so long as the questions in dispute set forth in said petition are before the board. It is further directed that a copy of this appointment be presented to the Honorable J. N. Holt and the attorneys of record for the parties.

"DONE and ORDERED this 22nd day of April, 1986." (Emphasis added.)

The Operatives raise a number of issues by their appeal. Nevertheless, we must first consider the parameters of Judge Bryan's "authority" in this case to consider many of these issues interjected by the Operatives as affirmative defenses to Management's petition for appointment. We agree with Judge

Bryan that his duty to appoint a presiding attorney is ministerial, provided that it is *undisputed* and *uncontroverted* that all of the prerequisites to such an appointment have been met. That is, all of the conditions set out in Article VII, Section 12, of the ACIPCo by-laws for such an appointment are present,[5] as well as the prerequisite mandated by this Court in *Ex parte Johnson, supra*, requiring that notice and opportunity to be heard be given to all necessary parties. If there are not factual disputes as to whether these prerequisites are met, the presiding judge's duty is purely ministerial and he has no discretion in making the appointment. Under these circumstances, he may, by way of mandamus, be compelled to perform his duty, or, conversely, be prevented from performing that duty where it is undisputed that one or more of the above prerequisites have not been met. See *Ex parte Johnson, supra,* and the dissenting opinion at 481 So.2d 360-61.

It is only when there are *factual issues* as to whether all of the prerequisites to such an appointment have been met that the

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[5] Under this section of the ACIPCo by-laws, the following are, in effect, preconditions to the appointment of an attorney by the presiding judge:

(1) Disputes between the two units (Management and Operatives) of the board of trustees;

(2) Direction to the secretary by either unit to refer the dispute(s) to the board of directors for resolution;

(3) Such referral made in writing by the secretary to the board of directors; and

(4) Petition brought by either unit, to the presiding judge of the court having jurisdiction of the Eagan trust, requesting the appointment of an attorney who is (a) authorized to practice law in Birmingham, Alabama, and (b) not a member of either unit of the board of trustees.

presiding judge's function becomes at least quasi-judicial. In that instance, the proceedings become adversarial, and by "deciding" the factual issues, and thereupon determining whether the appointment should be made, the presiding judge assumes the role of factfinder. Under these circumstances, the presiding judge's "decision" to appoint an attorney or not is one that would support an appeal. However, where there are no such factual issues to be decided, mandamus is the appropriate method of review.

In either event, upon the filing of only a petition for the appointment of an attorney under the language of the by-laws, *supra*, the purview of the presiding judge's power or "jurisdiction" is not in any way broadened to permit him to consider other matters besides those discussed above pertaining to the prerequisites for such an appointment. In other words, in the absence of a separate complaint filed invoking the full jurisdiction of the *circuit court*, it would be inappropriate for either party to present to the presiding judge matters pertaining to, for example, the merits of the reasons underlying the disputes between the Operatives and Management which necessitated resolution by the board of directors and therefore the petition for the appointment of a presiding attorney. Nor would it be appropriate, under a bare petition for appointment, for either party to present arguments to the presiding judge which, if accepted, would serve to invalidate the provision of the by-laws giving him the power to appoint an attorney to preside. Thus, Judge Bryan properly declined to rule on the issues pertaining to matters described above raised by the Operatives

in response to Management's petition for appointment. (See discussion *ante*.)

In this case, the Operatives responded to the petition filed by Management with an answer in which they claimed, among other things, that Management (petitioners) "failed to comply with the By-laws of [ACIPCo] as required by the rules and regulations of the Board of Trustees and the decision in *Moore v. Hardin*." They further claimed that "[t]he questions to be considered by the Board of Directors have been improperly certified by the secretary of the Board of Trustees to the Board of Directors." The record in this clearly establishes otherwise, and, therefore, the presiding judge's decision to appoint an attorney is due to be affirmed.

By their answer, the Operatives also sought to prevent the appointment by interjecting a number of other matters. They claimed that Management is estopped from petitioning for an appointment because "they have already filed two prior actions which are still pending in this Court requesting appointment of a Birmingham attorney to preside over a meeting of the American Cast Iron Pipe Company Board of Directors and have obtained the relief requested, but have failed and refused to exercise such relief and have abandoned those actions without pursuing or concluding the same or using the relief granted."

It is undisputed that the two prior petitions referred to above were filed as a result of *prior disputes* between the Operatives and Management. It may very well be that some of the prior disputes overlap with those that arose during the

January 27, 1986, meeting of the board of trustees of ACIPCo. Nevertheless, we fail to perceive how filing this petition, in addition to the previous petitions, "has probably injuriously affected substantial rights" of the Operatives. Rule 45, A.R.App.P. Indeed, had Management sought merely to make use of an appointment it had already obtained through prior petitions, it is likely that the Operatives would now be complaining that, because a subsequent meeting of the trustees was held out of which new disputes arose, another petition for appointment is necessary. On these facts, we find the Operatives' estoppel argument to be without merit.

The Operatives also sought to prevent the appointment essentially by attacking the validity of Article VII, Section 12, of the ACIPCO by-laws insofar as it allows the board of directors to resolve disputes between the Operatives and Management. Specifically, the Operatives alleged:

> "The Board of Directors is not an independent body as envisioned by the Court in *Moore v. Hardin* and in the rules and regulations of the Board of Trustees, but is merely a captive of the Board of Management of the American Cast Iron Pipe Company and, under those circumstances, any reference of any questions in dispute between the Board of Operatives and the Board of Management and the Board of Trustees to the Board of Directors is a sham and an artifice by the Board of Management as there is complete domination of the Board of Directors by the Board of Management.
>
> ". . . .

> "The reference of the questions on which divided votes were taken in the Board of Trustees at the subject meeting to the Board of Directors is contrary and inimical to the interest of the trust, the beneficiaries of the trust and is contrary to the duties of the trustees. . . ."

The merits of the issues raised by these allegations, however, are the subject of two other separate proceedings: one has been filed in Georgia seeking to challenge the change that was made in the Eagan codicil in 1924 at the request of Eagan's executors when the will was probated in Georgia in *Eagan v. Moore*, Case No. 61106 (Super. Ct., Fulton Co., Ga., December 15, 1924). (The codicil originally provided that tie votes between the Operatives and Management were to be resolved by a majority vote of the *trustees* presumably voting individually rather than each board casting one collective vote.) The other is a proceeding under Rule 60(b)(6) A.R.Civ.P., seeking to set aside the 1942 circuit court decree in *Moore v. Hardin*, Case No. 53715 (10th Jud. Cir of Ala., Equity, 1942), approving the rules and regulations submitted by the 1942 ACIPCo board of trustees (which incorporated the above change), and thereby finding that the trustees had the power under the Eagan codicil to make such rules and regulations to govern themselves as well as subsequent trustees. (The Operatives' appeal from the denial of this Rule 60(b) motion is consolidated herewith and is discussed *ante*.) Thus, not only was it improper for the Operatives to raise these matters in this proceeding (brought simply to have an attorney appointed) because they were the subject of other separate actions (see Code of 1975, Section 6-5-

440), but also the trial court was correct to follow the ACIPCo rules and regulations empowering it to appoint an attorney under the facts of this case. Until the Operatives succeed in their attempts to set aside decisions upholding these rules, the trial court is duty bound to follow those decisions.

Based on the foregoing, the order below is due to be affirmed.

IV. *85-1032 Adams v. Green*

On February 21, 1986, the Operatives filed a motion entitled " Motion Under Rule 60, Alabama Rules of Civil Procedure For Relief From Judgment And To Declare Judgment Void And For Preliminary Injunction." By that motion, the Operatives sought to set aside and/or obtain relief from a decree entered on April 6, 1942, in the case of *Moore v. Hardin*, Case No. 53715 (10th Jud. Cir. of Ala., Equity, 1942).

The bill of complaint filed in *Moore v. Hardin* by the ACIPCo board of trustees in 1942 named as respondents 12 ACIPCo employees, both white and black, employed in each of the various departments of ACIPCo, and alleged that all 1,500 ACIPCo employees could not be made respondents "without great inconvenience, . . . expense, and . . . oppressive delays," and further alleged that the "interest of all and each of said [ACIPCo employees . . . in the subject matter of this suit is the same, and the failure to make other employees parties to this cause will not adversely affect any of the rights of any of said employees as such employees if a proper representation of

employees be made parties hereto." After generally averring the origin, history, and composition of the ACIPCo board of trustees, the trustees alleged that their number "is comparatively large," and that the individual members changed from time to time, "especially . . . the members of the Board of Operatives, who are elected by the employees of the Company." The trustees, therefore, believed that they needed a set of rules and regulations for guidance in performing their duties as trustees. In accord with that belief, the 1942 trustees, predecessors to the parties herein, adopted a set of rules and regulations at the February 1942 board of trustees meeting, of which, by their complaint, they sought court approval. Specifically, the trustees sought instructions from the court as to their administration of the trust and a declaration of their rights, particularly as to

> "1. Whether or not your complainants as such trustees in the proper management and conduct of said trust have the right and authority to adopt reasonable rules and regulations which will govern the conduct of said trust and the actions of your complainants and their successors as trustees in the management and conduct of such trust.
>
> "2. Whether or not in the opinion of this court the rules and regulations submitted herewith, marked Exhibit G, are reasonable and proper rules and regulations to be adopted by the trustees, and, if so, that this court will duly approve same."

The trustees also asked the court to decree that the 12 employ-

ees named respondents represented the interests of all ACIPCo employees.

Each of the respondents individually executed a joint acceptance of service on April 2, 1942, stating as follows:

> "We hereby accept service of summons in the above—styled cause and do hereby waive any and all further notice of the filing of the bill of complaint in this cause and do agree that said case may be heard immediately."

An answer was also filed by Smyer & Smyer, as solicitors for respondents; that answer admitted certain of the allegations of the complaint and neither admitted nor denied certain others. The respondents also joined with the complainants in asking for instructions and directions as to the proper administration of the trust, and put in issue the question of whether or not the trustees have the right and authority to adopt reasonable rules and regulations governing the conduct of the trust, and the action of the trustees and their successors in the management and conduct of the trust.

Under the rules of procedure and practice in force at that time, the cause was submitted on the bill of complaint and exhibits, the answer, and the testimony of witnesses whose testimony had been taken down by a commissioner and submitted in writing. Based on this submission, the trial court entered a lengthy order in which it found, *inter alia*, that the 12 employees named as respondents were sufficiently representative of all classes of ACIPCo employees, and that it was, therefore, unnecessary to make any other employees respon-

dents to the cause. The court further found that it was desirable, and, in fact, necessary to the proper operation of the Eagan plan for the trustees to have suitable rules and regulations for the government of the board of trustees and that the trustees had the "right and authority" to adopt such rules and regulations. The court then specificially decreed that:

> "The rules and regulations adopted by complainants as such trustees are reasonable and proper rules and regulations to be adopted by them as such trustees and said rules and regulations are hereby in all things approved, and the complainants and their successors as such trustees are ordered to be governed and directed by said rules and regulations in their conduct of said trust."

No appeal was taken from this order, and the trustees have been governed by the rules and regulations approved therein since April 6, 1942. By their Rule 60 (b) motion, the Operatives sought to have this 1942 order set aside and declared void, alleging as grounds the following:

> "(a) the court lacked jurisdiction;
>
> "(b) the order promulgates a racially discriminatory scheme of trust management and control;
>
> "(c) nor guardian ad litem had been appointed to represent the interests of future beneficiaries and minor beneficiaries of the trust;
>
> "(d) it purports to adjudicate the rights of parties not before the court;

> "(e) the decree was entered in violation of the then applicable rules of law; and
>
> "(f) the proceedings were devoid of fundamental compliance with the requirements of procedural and substantive due process."

By order dated March 7, 1986, the trial denied the Operatives' request for a preliminary injunction. Then, on May 29, 1986, the trial court entered an order designated an "Order Denying Preliminary Injunction on the Merits." The substance of this order, however, deals exclusively with the merits of the Operatives' request for Rule 60 (b) relief; within the body of the order, there is no discussion whatsoever of the criteria applicable to motions for preliminary injunctions nor of whether the Operatives are entitled to preliminary injunctive relief. In its order, the trial court discussed only the merits of the grounds alleged by the Operatives in support of their Rule 60 (b) motion, and thereby denied that motion. The parties have so construed this order in their respective briefs and arguments to this court. Therefore, despite its denomination and the language of the mandate at the end, we treat this order according to its substance rather than its form and consider it as an adjudication (*i.e.*, a denial) of the Operatives' Rule 60 (b) motion.

Management correctly states the standard of review applicable to a trial court's decision to grant or deny a Rule 60 (b) motion for relief from judgment:

> "A strong presumption of correctness attaches to the trial court's determination of a motion made

> pursuant to Rule 60 (b), and the decision whether to grant or deny the motion is within the sound discretion of the trial judge, and the appellate standard of review is whether the trial court abused its discretion. *Pierson v. Pierson*, 347 So. 2d 985 (Ala. 1977). In reviewing a ruling of a trial court on a Rule 60 (b) (6) motion, the trial court's decision will not be disturbed unless it is determined 'that there is an absence of reasonable cause, that rights of others subsequently arising would be adversely affected, or that it is unjust.' [Citations omitted.] "

Ex parte Dowling, 477 So. 2d 400, 402-03 (Ala. 1984) . Having reviewed the record in this case, along with the respective arguments of the parties and the applicable authorities, we cannot say the trial court abused its discretion in denying the Operatives' motion to set aside a judgment entered almost 44 years ago. Indeed, under Alabama law, the only ground that can be asserted to set aside a 44-year-old judgment is that the judgment is *void on its face.* See *Sweeney v. Tritsch*, 151 Ala. 242, 44 So. 184 (1907). However, a "judgment cannot be void when the Court has jurisdiction of the parties and the subject matter." *Raine v. First Western Bank*, 362 So.2d 846, 849 (Ala. 1978). the Operatives contend that the court in *Moore v. Hardin, supra*, had neither subject matter jurisdiction nor jurisdiction of all the necessary parties. Specifically, they contend the judgment is void because: (1) no guardian ad litem was appointed to represent minor beneficiaries and absent beneficiaries and trustees; (2) the necessary parties were not before the court; and (3) there was no case or controversy. As to these three reasons, the trial court held as follows:

"Counsel for the plaintiffs is in error in stating that a justiciable controversy must be alleged and shown before this Court can take jurisdiction over a request by a trustee for instructions in the administration of a trust. *See, e.g., Peach v. First Nat'l Bank of Birmingham*, 247 Ala. 463, 25 So.2d 153 (1946); *Thurlow v. Berry*, 247 Ala. 631. 25 So.2d 726 (1946); *Kimbrough v. Dickinson*, 247 Ala. 324, 24 So.2d 424 (1946); *Dallas Art League v. Weaver*, 240 Ala. 432, 199 So. 831 (1941).

"In *Peach, supra*, the Court quoted with approval the following:

> "'As a general principle when a trustee is in reasonable doubt as to the extent of his powers or as to the proper manner in which to proceed under the trust, he may apply to a court of equity, which will interpret the trust instrument when necessary and when it is ambiguous in order to give him directions without other equity appearing in the bill.'

"In Bogert, *The Law of Trusts & Trustees*, Section 559 (2d Rev. 1980), the following is provided:

> "'Equity has jurisdiction over all matters relating to trust property, and in the execution and administration of the trust, in all cases of doubt as to their rights and liabilities and what their conduct should be, trustees are entitled to and should seek instruction and direction from the court.'
>
> ". . . .

"In *Ex parte Nick Johnson*, [481] So.2d 353 (Ala.

1985)], ACIPCO filed a petition in the Tenth Judicial Circuit requesting the Presiding Judge to appoint an attorney to preside over the meeting of the Board of Directors of ACIPCO as provided for in the rules and regulations quoted in this opinion. the Court appointed an attorney to preside over the meeting without notice having been given to any other party. Three days later, members of the Board of Operatives filed a motion to vacate the appointment. When this motion was denied, the Board of Operatives filed a petition for writ of mandamus with the Supreme Court of Alabama seeking to require the circuit court to vacate the appointment. The Supreme Court granted the writ, but only on the ground that the members of the Board of Operatives were entitled to reasonable notice and an opportunity to be heard in opposition to the application. The Supreme Court there stated:

> "'We do not agree with the petitioners' contention that the court below lacked subject matter jurisdiction. As we view the matter, the court acquired jurisdiction in the 1942 declaratory judgment action and, by approving and adopting the rules and regulations fo the Board of Trustees, it retained jurisdiction over the trust, the corpus of which is all located in Jefferson County. . . .'

"This Court also agrees with ACIPCO that it was not necessary in 1942 that every employee of ACIPCO be made a party or that a guardian ad litem had been appointed by the Court to represent future employees or those who were minors.

"Equity Rule 30 provided in part as follows:

"'*When parties are numerous, court may proceed, hav-*

ing before it parties to represent adverse interests. When the parties having vested interest in real or personal property are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court, in its discretion, may dispense with the making of all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiff and the defendant in the suit. But in such cases the decree shall be without prejudice to the rights of the absent parties in that they may claim their shares of any funds in court, or if paid out by order of court, may recover their shares from parties to whom such funds have been so paid.'

"Similarly, Title 7, Section 128, Alabama Code 1958, provided:

> "'In equity of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; if the consent of any one who should have been joined as a plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the bill of complaint, and when the question is one of a common or general interest of many persons, or where the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.'

> "That part of the rules and regulations of which the plaintiffs complain merely sets out a procedure for resolving a dispute occurring between the two units of the Board of Trustees. The Court agrees with ACIPCO that all of the employees were not

necessary parties to the 1942 action."

We agree with the trial court that requirements of both personal and subject matter jurisdiction were met in this case.

With respect to the Operatives' contention that necessary parties (including a guardian ad litem representing minor and absent beneficiaries and trustees) were not before the court, we point out that this issue of the sufficiency of naming only 12 employees as respondents was specifically adjudicated by the trial court in 1942. The issue was raised in the petition by the petitioners, and the trial court ruled as follows:

> "3. The beneficiaries of the trust created by said codicil to the will of John J. Eagan are the employees of American Cast Iron Pipe Company. These employees at the present time are more than one thousand five hundred in number. All of said employees reside in Jefferson County, Alabama, with the exception of a few employed at branch sales offices. All of the trustees reside in Jefferson County, Alabama. It is impracticable to make all of the employees of American Cast Iron Pipe Company respondents to this cause. To do so would cause great inconvenience, great expense, and oppressive delays in hearing this cause, and would result in no useful purpose. Twelve of said employees have been made respondents and are represented by their solicitor of record. They are employed in the various departments of the plant of the American Cast Iron Pipe Company and perform various classes of work. Some of said respondents are white employees and some are negro employees. *The interest of all of the employees of American Cast Iron Pipe Company in the subject matter of this suit is the same, and the court finds that the*

> *employees named respondents are sufficiently representative of all classes of such employees, and that it is unnecessary to make any other of such employees respondents to this cause.*" (Emphasis added.)

It is "well-settled that the denial of a 60 (b) motion *does not bring up for review on appeal the correctness of the judgment which the movant seeks to set aside,* but is limited to deciding the correctness of the order from which he appeals." (Emphasis added.) *Raine v. First Western Bank*, 362 So.2d at 848. Accordingly, the issue of whether the named respondents sufficiently represented the interests of those whose interests the Operatives now claim were not represented, is not properly reviewable in these proceedings. On their face, the 1942 proceedings disclose that the court acquired personal jurisdiction over those employees named respondents; the document evidencing service of process is valid on its face.

Furthermore, we agree with and adopt the trial court's order determining that the equity court had subject matter jurisdiction over the petition filed in 1942. Additional authority for that holding includes the following:

Bogert, *The Law of Trusts & Trustees*, Section 559 (Rev. 2d ed. 1980):

> "As a part of its general jurisdiction over trusts, *the court of equity has power to instruct and advise the trustee as to his powers and duties, on his request* or at the request of a beneficiary. Hence many doubts arising from ambiguity of the trust instrument or uncertainty of the law regarding the powers of a particular trustee may be resolved." (Emphasis added.)

Gilmer v. Gilmer, 245 Ala. 450, 453-54, 17 So.2d 529, 531 (1944):

> "As a general principle when a trustee is in reasonable doubt as to the extent of his powers or as to the proper manner in which to proceed under the trust, he may apply to a court of equity, which will interpret the trust instrument when necessary and when it is ambiguous in order to give him directions without other equity appearing in the bill. . . ."

Collins v. Morgan County National Bank, 226 Ala. 376, 379, 147 So. 161, 163 (1933), quoting 1 Pom. Eq., Section 352:

> "[T]he rule is well understood that: 'Whenever there is any bona fide doubt as to the true meaning and intent of provisions of the instrument creating the trust or as to the particular course which he ought to pursue, the trustee is always entitled to maintain a suit in equity at the expense of the trust estate, and obtain a judicial construction of the instrument and directions as to his own conduct.' . . ."

The Operatives also claim that the 1942 decree is due to be set aside on account of fraud. Under Rule 60 (b) (3), motions to set aside a judgment because of "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party" must be brought "not more than four months after the judgment, order, or proceeding was entered or taken." Rule 60 (b), however, goes on to provide that:

> "This rule does not limit the power of a court to entertain an independent action within a reasonable time and not to exceed three years after the entry of the judgment (or such additional time as is given by section 6-2-3 and Section 6-2-8, Code of Ala.) to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. . . ."

Clearly, even under Section 6-2-3, Code of 1975, the Operatives' claim for "fraud upon the court" is barred because, without question, more than two years prior to their filing of this action, the Operatives knew or should have known of the facts they alleged constituted fraud. This is especially true of the Operatives' claim that in 1942 the petitioners misrepresented to the court that the copy of Mr. Eagan's codicil attached to the bill of complaint was as Mr. Eagan wrote it. In other words, the Operatives contend that it was fraud upon the court not to specifically aver that modifications to the codicil had been made when the will was probated in Georgia in 1924. *Eagan v. Moore, supra.* We think that by using reasonable diligence, the Operatives could have discovered this alleged fraudulent omission far sooner that 43 years after the filing of the petition by the trustees in 1942.

In further support of their fraud claim, the Operatives offered the affidavit of James Whitehead, who was one of the 12 respondent/employees in *Moore v. Hardin, supra.* In his affidavit, Whitehead states the following:

> "The document which is attached to this affidavit

[the joint acceptance of service] bears my signature. I remember signing the document in 1942 but I was not told at that time what the document was nor was I told that it had anything to do with any court proceedings.

"The circumstances which let up to my signing the document which is attached to this affiavit are as follows:

"... I learned that there was going to be an opening in the company's 'YMCA Building.' ... This job which I was interested in, in the YMCA Building was a white collar job.... I was very interested in moving from the No. 2 ramming station in the monocast department to this white collar position in the YMCA Building and so I applied for the YMCA job opening.

"After I applied for the YMCA job, my supervisor on the No. 2 ramming station in the monocast department, Mr. Eugene Sparkman, approached me and asked if I would sign a document which he said would state that I approved of the Eagan plan. ... He said that I would have to sign a document which stated that I pledged to uphold the Eagan plan if I wanted to get the YMCA job. He told me to go to Mr. Dyer's office to sign the document he was talking about. ... When I got to Mr. Dyer's office, Mr. Dyer stated that he had been expecting me and he already had a document on his desk which I was supposed to sign. Mr. Dyer asked me to sign the document. A copy of that document is attached to this affidavit. *I did not read this document before I signed it because I was told that it only said that I pledged to uphold the Eagan plan. Neither Mr. Sparkman nor Mr. Dyer ever told me that the document which I was asked to sign and which I did sign had anything to do with any court case.*

> "I was never asked if I was willing to represent other blacks or other employees of ACIPCO. I never saw or heard any testimony of any kind from W. D. Moore, Henry J. Noble, C. D. Parr, A. J. Bryant, Sr., or Lawton B. Bascomb. I never saw or met any lawyer named Smyer nor did I ever see or meet or talk with any lawyer at all about any court case or about anything in connection with my signing of the document in question. I was never told that any lawyer named Smyer or any other lawyer was representing me." (Emphasis added.)

First of all, Whitehead's affidavit does not support the Operatives' claim for fraud *on the court*. See *Duncan v. Johnson*, 338 So.2d 21243 (Ala. 1976); *Bolden v. Sloss-Sheffield Steel & Iron Co.*, 215 Ala. 334, 110 So. 574 (1925). Rather, if these facts establish anything, it would be only that a fraud was perpetrated upon one of the respondents, not upon the court, and such a fraud claim falls under Rule 60(b) (3), which must be brought within four months after judgment is entered. Furthermore, even if these facts constituted a fraud upon the court, that claim is clearly barred by Section 6-2-3, *supra*, because the fact of the purported fraud could have been readily discovered by Whitehead had he read the acceptance of service at the time he signed it on April 2, 1942. See *Sharpe v. Crook Realty Co.*, 508 So.2d 262 (Ala. 1987); *Gonzales v. U-J Chevrolet Co.*, 451 So.2d 244 (Ala. 1984); *Torres v. State Farm Fire & Casualty Co.*, 438 So.2d 757 (Ala. 1983); *Sexton v. Liberty National Life Ins. Co.*, 405 So.2d 18 (Ala. 1981); *Seybold v. Magnolia Land Co.*, 376 So.2d 1083 (Ala. 1979). See also *Myers v. Geneva Life Ins. Co.*, 495 So.2d 532 (Ala. 1986).

The Operatives also attempted to have the 1942 judgment set aside because, at that time, the trust was racially discriminatory. We find the reasoning of the trial court on this issue to be correct and herewith adopt that portion of the trial court's order set out below:

> "It is true, as counsel for the Board of Operatives states, that certain provisions of the rules and regulations adopted under the Eagan trust have been found to be in violation of the 1964 Civil Rights Act and in violation of the Constitution. In *Pettway v. American Cast Iron Pipe Co.*, 322 F. Supp. 8ll (N.D. Ala. 1970) [reversed and remanded on other grounds, 474 F.2d 2ll (5th Cir. 1974)], the federal district court held that the racial restriction on membership on the Board of Operatives to 'white men only' was unlawful and 'must be removed.' However, the federal district court also stated:
>
> "'. . . The Board of Operatives will continue to operate and to carry out its functions as an integral part of the Eagan plan with its members serving as joint stockholders and co-trustees under the Eagan codicil as in the past, subject, however, to the eliminating of the racial restrictions on its members. the court further finds that upon the elimination of the racial restriction on membership to the Board of Operatives, the continued and separate existence of the Advisory Auxilliary Board composed of negro employees only and elected by negro employees only would be unnecessary and the court holds that the continuation of such separate Auxilliary Board would also constitute a violation of Title VII. Therefore, the Auxilliary Board must be abolished simultaneously with the elimination of the racial restriction on membership of the Board of Operatives.

"'The elimination of the racial restriction on the Board of Operatives, together with disestablishment of the separate Auxilliary Board will, in the opinion of the court, provide all employees of the company an equal opportunity regardless of the race or color to vote for representatives on the Board of Operatives and to serve on the Board of Operatives. Furthermore, in the future, the members of the Board of Operatives, elected and serving without regard to race or color, will be able to appoint all members of the standing committees and special committees of the Board of Operatives without being in violation of the provisions of Title VII.'

"At a subsequent eventiary hearing, the federal district court approved a plan submitted by ACIPCo for the purpose of carrying out the directives of the Court. The plan of compliance enlarged the number of electoral districts from five to twelve and provided for the election of one representative on the Board of Operatives for each district. The Court concluded:

"'The Court feels that it should not, and it will not, engage in a presumption that employees elected from fair and properly drawn electoral districts, will not fairly represent the interest and rights of employees of another race or color and faithfully serve as trustees under Mr. Eagan's will. . . .'

"In short, the federal district court did not conclude that the Eagan plan was invalid or that this Court's decree rendered in 1942 was invalid because of racially restrictive provisions contained in the original plan. Instead, the Court ordered the removal of those restrictions and then approved the plan as being in compliance with the Civil Rights

Act.

> "It is not for this Court at this time to conclude that this Court's decree rendered in 1942 interpreting the plan is invalid because racial restrictions since removed were left in place in 1942."

Finally, the Operatives argue in effect that the totality of their arguments justifies granting them relief from the 1942 judgment under Rule 60 (b) (6). they contend that the effect of the 1942 decree frustrates Mr. Eagan's basic intent in that it allows Management trustees to assume "absolute and unbridled control over the trust estate." *Farlow v. Adams*, 474 So.2d at 58.

Although the trial court did not specifically address the Operatives' Rule 60 (b) (6) claim, we agree with Management that the Operatives have not demonstrated compelling and extraordinary circumstances entitling them to Rule 60 (b) (6) relief. Furthermore, a Rule 60 (b) (6) motion must be based on some reason other than those stated in Rule 60 (b) (l) through (5), and there is the additional requirement that a Rule 60 (b) (6) motion be brought within a "reasonable time" after entry of judgment. As explained by the Seventh Circuit in its discussion of the "reasonable time" requirement of Rule 60 (b) in *Planet Corp. v. Sullivan*, 702 F.2d 123, 126 (7th Cir. 1983), "[w]hat constitutes 'reasonable time' depends on the facts of each case, taking into consideration the *interest in finality, the reason for delay; the practical ability to learn earlier of the grounds relied upon*, and prejudice to other parties." (Quoting *Ashford v. Steuart*, 657 f.2d 1053, 1055 (9th Cir. 1981)). (Emphasis added.)

It clearly appears that if the rules and regulations approved in the 1942 decree permitted the Management to exercise "absolute and unbridled" control over the trust estate, that result should have been evident to the Operatives much sooner than almost 43 years later. Accordingly, we hold that the Operatives' Rule 60 (b) (6) motion is untimely and, therefore, the trial court did not abuse its discretion in denying the motion.

Based on the foregoing, the judgments below are due to be, and they hereby are, affirmed.

AFFIRMED.

Maddox, Jones, Shores, and Houston, JJ., concur.

APPENDIX G

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

85-300 - LELAND C. ADAMS, JR., ET AL.,
Appellant,

v.

AMERICAN CAST IRON PIPE CO., ET AL.,
Appellee.

85-448 - LELAND C. ADAMS, JR., ET AL.,
Appellant,

v.

AMERICAN CAST IRON PIPE CO., ET AL.,
Appellee.

85-888 - LELAND C. ADAMS, JR., ET AL.,
Appellant,

v.

AMERICAN CAST IRON PIPE CO., ET AL.,
Appellee.

85-1032 - LELAND C. ADAMS, JR., ET AL.,
Appellant,

vs.

PAUL W. GREEN, ET AL.,
Appellee.

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

_____ Appeal docketed. Future correspondence should refer to the above number.

_____ Court Reporter granted additional time to file reporter's transcript to and including

_____ Clerk/Register granted additional time to file clerk's record/record on appeal to and including

_____ Appell _____ granted 7 additional days to file briefs to and including

_____ Appellant(s) granted 7 additional days to file reply briefs to and including

_____ Record on Appeal filed

_____ Appendix Filed

_____ Submitted on Briefs

_____ Petition for Writ of Certiorari denied. No opinion.

XXX Application for rehearing overruled. No opinion written on rehearing.
Beatty, J. - Maddox, Jones, Shores and Houston, JJ., concur.

_____ Permission to file amicus curiae briefs granted

_____

S/Robert G. Esdale, Clerk
Supreme Court of Alabama

APPENDIX H

FOURTEENTH AMENDMENT, SECTION I TO THE UNITED STATES CONSTITUTION

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. SECTION 2000e-2

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

ALABAMA RULE OF CIVIL PROCEDURE

RULE 60. RELIEF FROM JUDGMENT OR ORDER

(a) Clerical Mistakes. Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal or thereafter, such mistakes may be so corrected by the trial court. Whenever necessary a transcript of the record as corrected may be certified to the appellate court in response to a writ of certiorari or like writ.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. Oe motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgement should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than four months after the judgment, order or proceeding was entered or taken. A motion under this subdivision does not affect the finality of a judgment or suspend is operation. Leave to make the motion need not be obtained from any appellate court except during such time as an appeal from the judgment is actually pending before such court. This rule does not limit the power of a court to entertain an independent action within a reasonable time and

not to exceed three years after the entry of the judgment (or such additional time as is given by Tit. 7 Sections 36 and 42 Code of Alabama) to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, supersedeas, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

APPENDIX I

GEORGIA)
)
FULTON COUNTY)

TO THE SUPERIOR COURT OF SAID COUNTY: -

The petition of Susan Young Eagan and Marion M. Jackson, Executors of the last will and testament of John J. Eagan, deceased, as plaintiffs, against W. D. Moore, C. D. Barr, Paul A. Ivy, Claude Nail, Wade Howard, W. R. Bryant, A. J. Bryant, Ed Dougherty, A. H. Smith, John Ogletree, Jess Henson, Will Davis and M. J. Wilson, as Trustees for the employees of the American Cast Iron Pipe Company, for the wives and children of said employees and for the general public, and against said W. D. Moore, C. D. Barr, Paul A. Ivy, Claude Nail, Wade Howard, W. R. Bryant, A. J. Bryant, Ed Dougherty, A. H. Smith, John Ogletree, Jess Henson, Will Davis and M. J. Wilson in their capacities as employees of said American Cast Iron Pipe Company, and as such, representatives of all other employees and of all future employees of said American Cast Iron Pipe Company, and against said American Cast Iron Pipe Company, as a corporation, as defendants, alleges that: -

1. Your petitioners are the Executors of the last will and testament of John J. Eagan, late of DeKalb County, Georgia, who died the 30th day of March 1924, your petitioners having been appointed Executors of said will, when said will was

probated in solemn form at the May Term of the Court of Ordinary of DeKalb County, Georgia, a copy of said will being hereto attached and marked "Exhibit A", to which leave of reference as often as may be necessary is prayed,

2. Said defendants, W. D. Moore, C. D. Barr, Paul A. Ivy, Claude Nail, Wade Howard, W. R. Bryant, A. J. Bryant, Ed Dougherty, A. H. Smith, John Ogletree, Jess Henson, Will Davis and N. J. Wilson are residents of the County of Jefferson and State of Alabama.

3. Said defendant, the American Cast Iron Pipe Company is a corporation incorporated under the laws of the State of Georgia, with its principal office in the County of Fulton, State of Georgia.

4. By a codicil to said will, which said codicil was probated with said will, said Eagan gave and bequeathed to W. D. Moore, C. D. Barr, and Paul A. Ivy, and their successors in office, as members of the board of management of said American Cast Iron Pipe Company, and to Claude Nail, Wade Howard, W. R. Bryant, A. J. Bryant, Ed Dougherty, A. H. Smith, John Ogletree, Jess Henson, Will Davis, and M. J. Wilson, and their successors in office as members of the Board of Operatives of said American Cast Iron Pipe Company, jointly, in trust for the purposes set forth in said codicil, ten hundred and eighty-five (1085) shares of the common stock, being all of the common stock issued and outstanding of said American Cast

Iron Pipe Company.

5. Petitioners represent that in their opinion, said bequest to said Trustees is charitable within the meaning of the law, creating a perpetual trust, for that it embraces and undertakes to provide for the relief of the aged, impotent and poor among the present and future employees of the American Cast Iron Pipe Company; for the construction of public works, and other public conveniences; for the relief of human suffering, and the promotion of human civilization and for religious purposes; and for the education and promotion of those engaged in the craft of manufacturing and selling cast iron pipe; and for the education of the owners of industries in the United States, and for the promotion of the condition of those who are engaged in the operation of the industries of the country. Question has arisen as to the nature of the said trust and it is of great importance that this be conclusively determined as speedily as is practicable by a court having jurisdiction over the same. Your Petitioners as Executors as aforesaid should not be required to determine this question at their peril.

6. In said codicil said Eagan in giving direction as to the manner in which said Trustees shall vote said common stock in said American Cast Iron Pipe Company uses the following language, to wit:

> "It is my will and desire, and I direct that in determining all questions as to voting said stock, and as to carrying out the provisions of the trust

created by this codicil, the members of the Board of Management as Trustees, shall vote as a unit, and the members of the Board of Operatives as Trustees, shall vote as a unit, the vote of each group to be determined by the majority vote of the members of the respective boards; and that in the event of the failure of the respective groups of Trustees to agree upon any question said question in dispute shall be referred to the Board of Trustees whose decision on said question in dispute shall be final."

7. If the words "Board of Trustees" in the paragraph of said codicil, quoted just above, are construed to designate the members of the said Board of Management and said Board of Operatives, as Trustees under the terms of said codicil, said paragraph would make it impossible for said Trustees to determine any question as to voting said stock in said American Cast Iron Pipe Company, or as to determining any question as to carrying out the provisions of the trust created by said codicil, if a difference between the two respective groups of Trustees should rise, since said paragraph expressly provides "that in determining all questions as to voting said stock, and as to carrying out the provisions of the trust created by this codicil, the members of the Board of Management, as Trustees, shall vote as a unit, and the members of the Board of Operatives as Trustees, shall vote as a unit thereby in the event of a difference between said groups of Trustees, creating a deadlock between said respective groups of trustees, which said deadlock would destroy the object and intent of the testator in creating said trust, thereby preventing the carrying out of the will and purpose of said testator, John J. Eagan.

8. It was the purpose and intention of said testator, John J. Eagan, to provide by the paragraph in said codicil, quoted and referred to in the two paragraphs next above, a method for settling and determining any dispute or difference, which might rise between the said two groups of Trustees, namely, the members of the Board of Management and the members of the Board of Operatives, in voting said stock of said American Cast Iron Pipe Company, by providing that any such difference or dispute between the respective groups of Trustees should be referred to the Board of Directors of the American Cast Iron Pipe Company, the decision of said Board of Directors to be final in determining said dispute or difference, which intention and purpose of said testator was expressed by word of mouth by said testator and in a document from which said codicil was copied when being drawn by said Eagan, said document having been identified in the handwriting of said Eagan and left by him together with his will in a sealed envelope, wherein said document was found by said executors when said will was opened after the death of said Eagan, a copy of said document being hereto attached and marked Exhibit "B" to which leave of reference as often as it may be necessary is prayed, which said purpose and intention of said testator will be wholly defeated, if the construction commonly given to the words "Board of Trustees", as the words appear in said paragraph of said codicil, is given to said words.

9. For the proper conduct of the business of the said American Cast Iron Pipe Company and for the protection of

the properties controlled by said common stock in said company, it is essential that the purpose and intention of said testator, John J. Eagan, as to voting said common stock shall be given full force and effect.

10. It is the duty of your Petitioners, as executors of the last will and testament of John J. Eagan, to carry out the purposes and intentions of said testator in making said will, to insure the safety and protection of the properties covered and affected by the trust created by said testator by said will for the benefit of the present and future employees of the American Cast Iron Pipe Company, their families, and the public, and to make certain, in so far as is humanly possible, the fulfillment of the purpose and intention of said testator in creating said trust.

Therefore, Petitioners pray an order:

First: Construing the bequest of the ten hundred and eighty-five (1085) shares of stock in the American Cast Iron Pipe Company by said codicil to the members of the Board of Management and the members of the Board of Operatives of said Company, jointly, the their successors in office in said Board, as Trustees, to be a charitable bequest within the meaning of the law of Georgia, thereby creating a perpetual trust for charitable purposes.

Second: Construing the words "Board of Trustees", where said words appear in the paragraph of the codicil to the

will of John J. Eagan, reading:

> "It is my will and desire, and I direct that in determining all questions as to voting said stock, and as to carrying out the provisions of the trust created by this codicil, the members of the Board of Management as Trustees, shall vote as a unit, and the members of the Board of Operatives as Trustees, shall vote as a unit, the vote of each group to be determined by the majority vote of the members of the respective Boards; and that in the event of the failure of the respective groups of Trustees to agree upon any question said question in dispute shall be referred to the Board of Trustees whose decision on said question in dispute shall be final."

to mean and designate the Board of Directors of the American Cast Iron Pipe Company.

Third: Directing your Petitioners, as Executors of the last will and testament of John J. Eagan, to deliver to said W. D. Moore, C. D. Barr, and Paul A. Ivy, as members of the Board of Management, and to Claude Nail, Wade Howard, W. R. Bryant, A. J. Bryant, Ed Dougherty, A. H. Smith, John Ogletree, Jess Henson, Will Davis and M. J. Wilson, members of the Board of Operatives of the American Cast Iron Pipe Company, jointly, and their successors in office in said Boards, as Trustees, the ten hundred and eighty-five (1085) shares of stock of the American Cast Iron Pipe Company, now in the possession of Petitioners as Executors of the last will and testament of John J. Eagan.

Wherefore, petitioners pray that process may issue requiring said defendants to be and appear at the next term of the Superior Court of said County to answer petitioners' complaint.

S/Marion M. Jackson
Petitioners' Attorney.

GEORGIA)
)
FULTON COUNTY)

Personally came before the undersigned attesting officer, S/Susan Young Eagan, the subscriber, who being duly sworn, on oath says that the facts stated in the foregoing petition are true.

S/Susan Young Eagan

Sworn to and subscribed
before me, this 12th day of
August, 1924.

(Signature Illegible)
NOTARY PUBLIC STATE OF GA., AT LARGE

EXHIBIT "A"

Copy of the last will and testament of John J. Eagan

State of Georgia)
)
County of Fulton)

I, John J. Eagan, of said state and county, being of sound and disposing mind and memory, do make this my last will and testament, hereby revoking all others by me heretofore made.

Item One- I give and bequeath to Marion M. Jackson the sum of eighteen thousand dollars.

Item Two- I direct that all debts owing me by Marion M. Jackson and his wife Evie Parsons Jackson at the time of my death be cancelled in full.

Item Three- I give and bequeath to J. E. Kirk, provided he be in my employ at the time of my death, the sum of twelve thousand dollars.

Item Four- I direct that all debts owing me by J. E. Kirk, at the time of my death, be cancelled.

Item Five- My mother and Mrs. Mary V. Eagan being advanced in years and possessed of an independent fortune I give and bequeath to her as tokens of love and affection my gold watch and chain, the portraits of my uncle and grandmother, my personal Bible and such other of my pictures and books as she may desire.

Item Six- I give and bequeath to each of my children

living at the time of my death the sum of one thousand dollars.

Item Seven- I give, bequeath and devise to my wife Susan Young Eagan all other property owned by me, whether real or personal, of every kind whatsoever.

Item Eight- It is my request of my wife (and I know that she would be forward to do this without any request from me) that in case there should be any loss of my mother's fortune that she see my mother is amply provided for out of the funds willed to her, i.e. my wife Susan Young Eagan. It is not my request or desire that this item of my will shall delay any disposition of my estate or any part of same that my wife should desire to make. What I desire is that in case there should be loss of my mother's fortune (which now seems humanly speaking, impossible) my wife will see that my mothers needs are provided for along with the needs of herself (my wife) and our children.

Item nine - I hereby appoint my wife, Mrs. Susan Young Eagan executrix and Marion M. Jackson executor of this my last will and testament. They are authorized to sell or exchange any properity and securities at public or private sale, to make any infestments, and to set with reference my property under this will without order of court and without making any report to said court or to any court of said executrix and executors actions.

This April22nd, 1922. (sgd.) Jno. J. Eagan

Signed, sealed, published and declared by John J. Eagan as his last will and testament, in the presence of us, the undersigned, who subscribe our names hereto, in the presence of said testator, after he had signed his name thereto, and at his special instance and request - he signing in our presence and each of us signing in his presence and in the presence of each other.

(sgd) A. E. Ramseur
Nettie Catoe
N. A. Etheridge.

Nettie Catoe
Norman P. Cooledge
H. A. Etheridge

Georgia)
)
Fulton County)

Whereas I Jno. J. Eagan, did on the 22nd day of April, 1922 sign, seal, declare and publish my last will and testament in the presence of A. E. Ramseur, Nettie Catoe and H. A. Etheridge who signed said will and testament as witnesses:

And whereas, I desire to add an additional bequest and devise in said will and testament I therefore make, declare and publish this codicil to said will and testament, to-wit:

I hereby give, bequeath and devise ten hundred and eighty-five (1085) shares of common stock of the American Cast Iron Pipe Company being all of my holdings of said common stock of said company to the members of the Board of Management and the Members of the Board of Operatives of said American Cast Iron Pipe Company, jointly, and their successors in office in said boards, as trustees, in trust for the following purposes, and subject to the directions hereinafter set forth, to-wit:

First: To receive all dividends paid upon said stock and use so much of the dividends thus received, as said trustees, in their discretion may deem advisable in supplementing the

salaries and wages of the employees of said American Cast Iron Pipe Company in amounts in the judgment of the said trustees to insure to each of said employees an income equivalent to a "living wage", said trustees to be the sole judges of what constitutes a living wage and of the amonts if any to be paid to each one or any of said employees of said company.

Second: To use such sums from the dividends received upon said stock, as said trustees in their discretion may deem advisable, in paying an income to any employee or to the wife and minor children of any employee of said American Cast Iron Pipe Company, at such times as the plant of said company may shut down for any cause, or at such times as said employee, through no fault of his or her own, but through accident, sickness, or other unavoidable causes, shall be unable to work; and said trustees are hereby made the sole judges of the amounts, if any, which shall be paid by said trustees to any employee, or to the members of any employees family under the provisions of this paragraph.

Third: To vote said certificates of stock in said American Cast Iron Pipe Company at all meetings of stockholders of said company.

It is my will and desire, and I direct that in determining all questions as to voting said stock, and as to carrying out the provisions of the trust created by this codicil, the members of the Board of Management as Trustees, shall vote as a unit, and the members of the Board of Operatives as Trustees, shall vote as a unit, the vote of each group to be determined by the majority vote of the members of the respective boards; and that

in the event of the failure of the respective groups of trustees to agree upon any question said question in disputesshall be referred to the Board of Trustees whose decision on said question in dispute shall be final.

Any member of either of said boards, who shall cease to be a member of either board for any cause whatsoever shall thereupon cease to be a trustee under this codicil of my will. His or her successor upon either of said boards, becoming, by virtue of his or her office, a trustee under this codicil, immediately upon his or her acceptance of said trust.

Any employee of said American Cast Iron Pipe Company who shall die, or who shall, voluntarily or involuntarily, for any cause whatsover, other than the temporary shutting down of the plant or plants of said company, leave the employment of said company, shall immediately thereupon cease to have any interest of any kind whatsoever in any income from, or in any part of the trust estate created by this codicil of my will.

Any person, who may hereafter at any time enter the employment of said company, shall immediately thereupon become a beneficiary of said trust estate with all of the rights and privileges enjoyed by the employees of said company at the time of my death, and subject to the same condiditions.

The provisions of the two paragraphs immediately preceding the paragraph shall apply to the wife, or child, or the wife and children, or children of said employee of said company, if there be wife, or child or children or both, provision having been made for them in the event the death of said

employee leaving such, under the rules for the management of said company or its pension fund.

By this codicil of my will and testament, it is my purpose, will and desire to create a trust estate both for the benefit of the persons actually in the employ of said American Cast Iron Pipe Company, and for such persons as may require the product of said Company.

The Trustees, appointed by this codicil, in accepting the trust and acting hereunder will be trustees both for said employees and said persons requiring the product of said company. It is my will and desire that said trustees in the control of said company, through the control of said common stock, shall be guided by the sole purpose of so managing said company as to enable said American Cast Iron Pipe Company to deliver the companys product to persons, requiring it, at actual cost, which shall be considered the lowest possible price consistent with the maintenance and extension of the company's plant or plants and business and the payment of reasonable salaries and wages to all the employees of said company, my object being to insure "service" both to the purchasing public and to labor on the basis of the Golden Rule given by our Lord and Savior Jesus Christ.

This the 3rd day of April, 1923. (Sgd) Jno. J. Eagan.

Signed, sealed, declared and published by Jno. J. Eagan as a codicil to his last will and testament, in the presence of us the undersigned, who subscribe our names hereto in the presence of said testator, after he had signed his name thereto, and at his special instance and request, and in the presence of each

other - this the 3rd of April 1923.

Sgd Nettie Catoe
Norman P. Cooledge
H. A. Etheridge

EXHIBIT "B"

Copy of document found in envelope with the last will and testament of John J. Eagan.

Suggestions of Marion M. Jackson as to the plan of disposingof Acipco Common Stock to insure the object of my mind.

GEORGIA)
)
FULTON COUNTY)

Whereas, I, John J. Eagan, did on the , 19 , sign, seal, declare and publish my last will and testament in the presence of , who signed said will and testament as witnesses:

And whereas, I desire to add an additional bequest and devise in said will and testament, I, therefore, make and declare and publish this codicil to said will and testament, to-wit:

1. I hereby give, bequeath and devise ten hundred and eighty-five (1085) shares of the common stock of the American Cast Iron Pipe Company, being all of my holdings of said common stock of said company, to the members of the Board of Management and the members of the Board of Operatives of said American Cast Iron Pipe Company, jointly, and their successors in office in said boards, as trustees, in trust for the following purposes and subject to the directions hereinafter set forth, to-wit:

First: To receive all dividends paid upon said stock and use so much of the dividends thus received, as said trustees in their discretion may deem advisable, in supplementing the

salaries and wages of the employees of said American Cast Iron Pipe Company in amounts sufficient in the judgment of said trustees to insure to each of said employees an income equivalent to "a living wage," said trustees to be the sole judges of what constitutes "a living wage," and of the amounts, if any, to be paid to each one or any of said employees of said company.

Second: To use such sums from the dividends received upon said stock, as said trustees in their discretion may deem advisable, in paying an income to any employee, or to the wife and minor children of any employee of said American Cast Iron Pipe Company, at such time as the plant of said company may shut down for any cause, or at such times as said employee through no fault of his or her own, but through accident, sickness, or other unavoidable causes, shall be unable to work; and said trustees are hereby made the sole judges of the amounts, if any, which shall be paid by said trustees by any employee, or to the members of any employee's family under the provisions of this paragraph.

Third: To vote said certificates of stock in said American Cast Iron Pipe Company at all meetings of stockholders of said Company.

It is my will and desire, and I direct that in determining all questions as to voting said stock, and as to carrying out the provisions of the trust created by this codicil, the members of the Board of Management as trustees, shall vote as a unit, the vote of each group to be determined by the majority vote of the members of the respective boards; and that in the event of the failure of the respective groups of trustees to agree upon any question said question in dispute shall be referred to the Board of Directors, whose decision shall be final.

Any member of either of said boards, who shall cease to be a member of either board for any cause whatsoever shall thereupon cease to be a trustee under this codicil of my will, his or her successor, upon either of said boards, becoming, by

virtue of his or her office, a trustee under this codicil, immediately upon his or her acceptance of said trust.

Any employee of said American Cast Iron Pipe Company who shall die, or who shall, voluntarily or involuntarily, for any cause whatsoever, other than the temporary shutting down of the plant or plants of said company, leave the employment of said company, shall immediately thereupon cease to have any interest of any kind whatsoever in any income from, or in any part of the trust estate created by this codicil of my will.

Any person, who may hereafter at any time enter the employment of said Company, shall immediately thereupon become a beneficiary of said trust estate with all of the rights and privileges enjoyed by the employees of said Company at the time of my death, and subject to the same conditions.

The provisions of the two paragraphs immediately preceding this paragraph shall apply to the wife and children or child, or the wife or child, or children of said employee of said company, if there to be a wife, or child, or children, or both, provision having been made for them, in the event of the death of said employee leaving such, under the rules for the management of said company.

By this codicil to my will and testament, it is my purpose, will and desire to create a trust estate for both the benefit of the persons actually in the employ of said American Cast Iron Pipe Company, and for such persons, as may require the product of said Company.

The trustees, appointed by this codicil, in accepting the trust and acting hereunder, will be trustees both for said employees and said persons requiring the product of said company.

It is my will and desire that said trustees in the control of said company, through the control of said common stock,

shall be guided by the sole purpose of so managing said company as to enable said American Cast Iron Pipe Company to deliver the company's product to persons, requiring it, at actual labor, which shall be considered the lowest price consistent with the maintenance and extension of the company's plant and business and the payment of reasonable salaries and wages to all of the employees of said company, my object being to insure "service" both to the purchasing public and to labor on the basis of the Golden Rule given by our Lord and Savior, Jesus Christ.

This day of 1923.

(L.S.)

(Handwritten document)

Service of the within petition is accepted on behalf of all of the defendants herein named. Further services are waived. This August 12, 1924.

Alston, Alston, Foster & Moise
Attorneys for all of the
defendants named in this fore-
going and (illegible) petition.

Fulton Superior Court
September Term, 1924

Mrs. Susan Young Eagan
and Marion M. Jackson,
Executors of the Will of
John J. Eagan, Deceased

vs.

W. D. Moore, C. D. Barr,
Paul A. Ivey, et al, as Trustees for
The American Cast Iron Pipe Co.

Petition for Construction of Will

Minutes 104 Page 43
Received in office this the
12th day of August, 1924

S/T. C. Miller

Marion M. Jackson,
Petitioners' Attorney

MRS. SUSAN YOUNG EAGAN	)	
AND MARION M. JACKSON,	)	
As Executors of the Last	)	
Will and Testament of	)	
JOHN J. EAGAN, Deceased,	)	IN THE SUPERIOR
	)	COURT OF
	)	FULTON COUNTY,
	)	GEORGIA.
VS.	)	
	)	
W. D. MOORE, ET AL.,	)	
As Trustees, ET AL.	)	

Now come the defendants, W. D. Moore, C. D. Barr, Paul A. Ivy, Claude Nail, Wade Howard, W. R. Bryant, A. J. Bryant, Ed Dougherty, A. H. Smith, John Ogletree, Jess Henson, Will Davis and M. J. Wilson, Trustees for the employees of the American Cast Iron Pipe Company, for the wives and children of said employees and for the general public, and W. D. Moore, C. D. Barr, Paul A. Ivy, Claude Nail, Wade Howard, W. R. Bryant, A. J. Bryant, Ed Dougherty, A. H. Smith, John Ogletree, Jess Henson, Will Davis and M. J. Wilson, in their capacities as employees of said American Cast Iron Pipe Company, and as such, representatives of all other employees of said American Cast Iron Pipe Company; and AMERCIAN CAST IRON PIPE COMPANY, and answer the petition of the said petitioners, and for answer thereto, say:

1.

Defendants admit the allegations contained in paragraph 1 of petitioners' petition.

2.

Defendants admit the allegations contained in paragraph 2 of petitioners' petition.

3.

Defendants admit the allegations contained in paragraph 3 of petitioners' petition.

4.

The allegations contained in paragraph 4 of the petition are correct.

5.

Defendants aver that they are informed that the trust created by the aforementioned codicil to the will of John J. Eagan, wherein the ten hundred and eighty-five (1085) shares of the common stock of the American Cast Iron Pipe Company were bequeathed, as is set out in the said codicil, is a charitable trust, and they are further advised that it is of great importance to the said trust and to those at interest therein, that the said trust be decreed to be a charitable one.

6.

The allegations contained in paragraph 6 are admitted.

7.

Defendants believe that the expression, "Board of Trustees", as is set out in the quotation from said codicil of the will of John J. Eagan above quoted, should be construed to the equivalent to the Board of Directors of the American Cast Iron Pipe Company.

8.

Defendants believe the allegations contained in paragraphs 8, 9, and 10 of said petition to be true.

Further answering the said petition, the defendants state that the Trustees under the will of John J. Eagan, to-wit: the members of the Board of Management of the American Cast Iron Pipe Company and the members of the Board of Operatives of said Company, have in meeting assemble considered the petition to construe the codicil to the will of John J. Eagan, and by appropriate resolution, copy of which is hereto attached marked "Exhibit A", have expressed the opinion that the bill should be construed in accordance with the prayers of this petition.

WHEREFORE, these respondents, acting as Trustees under the will of the said John J. Eagan and as employees of the American Cast Iron Pipe Company and as representatives of all other employees and all future employees of the American Cast Iron Pipe Company, do express to the Court their opinion that the will should be reformed in accordance with the allegations contained in the prayers of said petition.

9.

The American Cast Iron Pipe Company, the corporate defendant in said case, is interested in this subject only to the extent that it may know in whom its corporate control rests. This defendant also expressed to the Court its views that this will should be reformed in the manner prayed in said petition.

S/Alston, Alston, Foster and Moise
Attorneys for Defendants.

STATE OF ALABAMA,)
)
COUNTY OF JEFFERSON.)

BEFORE ME, the undersigned Notary Public, personally appeared W. D. Moore, who being by me duly sworn, deposeth and saith on oath that he is one of the defendants in the above mentioned case; that he is President of the American Cast Iron Pipe Company and is Chairman of the Board of Trustees under the will of John J. Eagan. This defendant states that the facts set out in the foregoing answer are true, except when made upon information and belief, and then he varily believes them to be true.

Sworn to and subscribed before me, this 31st day of October 1924.

S/Rachel Chaplin
Notary Public)

S/W. D. Moore

EXTRACT FROM THE MINUTES OF

JOINT MEETING OF THE NUMBERS OF
THE BOARD OF MANAGEMENT AND OF
THE MEMBERS OF THE BOARD OF OPERATRIVES
OF THE AMERICAN CAST IRON PIPE CO.,
HELD IN THE OFFICE OF THE COMPANY,
JUNE 26, 1924.

The Chairman then introduced to the meeting Mr. Marion M. Jackson, the executor fo the will of Mr. Eagan. Mr. Jackson produced and read to the meeting a letter dated June 25, 1924, addressed to the Board of Management and the Board of Operatives, and signed by Mrs. Susan Young Eagan, the widow of John J. Eagan and his executrix, and by Marion M. Jackson, who is the executor of the said will, setting forth certain facts and their opinions bearing on two points concerning the codicil to the will of Mr. Eagan. Mr. Jackson made a statement to the meeting as to the meaning of the phrase, "Board of Trustees" as that phrase is used in the third paragraph of said codicil in the following connection.

> "It is my will and desire, and I direct, that in determining all questions as to voting said stock, and as to carrying out the provisions of the trust created by this codicil, the members of the Board of Management, as trustees, shall vote as a unit, and the members of the Board of Operatives, as trustees shall vote as a unit, the vote of each group to be determined by the majority vote of the members of the respective boards; and that in the event of the failure of the respective groups of trustees to agree upon any question, said question in dispute shall be referred to the Board of Trustees, whose decision on said question in dispute shall be final."

After consideration of Mr. Jackson's statement and the aforementioned letter, the following resolution was offered by A. J. Bryant, seconded by Jess Henson, and unanimously

adopted:

> BE IT RESOLVED that it is the sense of this meeting that the expression "Board of Trustees", as used in the above quotation from the codicil to the will of John J. Eagan, should be construed as though the same read, "Board of Directors of American Cast Iron Pipe Company."
>
> BE IT FURTHER RESOLVED that these trustees do cause proceedings to be instituted in the Superior Court of Fulton or DeKalb County, Georgia, to establish this construction to the codicil to the will of said John J. Eagan.
>
> BE IT FURTHER RESOLVED that the Chairman of this meeting and C. D. Barr and A. J. Bryant are hereby appointed a committee to represent the members of the Board of Management and the members of the Board of Operatives as trustees under said codicil in this behalf, and that any such proceedings which may be filed shall be upon behalf of the said trustees and their successors in office and as well on behalf of all persons who are beneficiaries under said will and codicil, or who may become such beneficiaries.
>
> Birmingham, Alabama, October, 1924.

I, the undersigned, Secretary of the Board of Trustees under the will of John J. Eagan, do hereby certify that the foregoing is a trust and correct copy of the extract from the minutes of the joint meeting of the members of the Board of Management and of the members of the Board of Operatives of the American Cast Iron Pipe Company, held in the office of the

Company on June 26, 1924.

WITNESS my hand and official signature.

S/Paul A. Ivy
Secretary, Board of Trustees
under Will of John J. Eagan.

IN THE SUPERIOR COURT OF
FULTON COUNTY, GEORGIA.

MRS. SUSAN YOUNG EAGAN
AND MARION M. JACKSON,
EXECUTORS,

-VS-

W. D. MOORE, ET AL.,
AS TRUSTEES, ET AL.

ANSWER OF DEFENDANTS.

RecordedWrits 327 Page 401
18th day December, 1924
(Signature illegible), Clerk

MINUTES 101 PAGE 703

Received in office this the
10th day of November, 1924.

S/T. C. Miller, Clerk

ALSTON, ALSTON, FOSTER & MOISE
Attorneys At Law
Atlanta, GA.

(Handwritten on document) Read, Considered, and Ordered filed. Whatever judgment by or enter (illegible) default has been entered in said cause is hereby vacated and set aside.

This 10th day of November, 1924.

S/John D. (illegible), Judge Superior Court, Atlanta Circuit

MRS. SUSAN YOUNG EAGAN AND MARION M. JACKSON, As Executors of the Last Will and Testament of JOHN J. EAGAN, DECEASED,	) IN THE SUPERIOR) COURT OF FULTON) COUNTY, GEORGIA.) PETITION TO CON-) THE WILL OF JOHN) J. EAGAN.
VS.	)
W. D. MOORE, ET AL.	)

We the Jury find for the petitioners that the bequest of one thousand and eighty-five (1085) shares of the capital stock of the American Cast Iron Pipe Company, mentioned in the codicil of the will of said John J. Eagan should be construed to be a charitable bequest, within the meaning of the laws of Georgia, thereby creating a perpetual trust for charitable purposes, in accordance with the allegations of Paragraph five (5) of said petition, and the first prayer of the said petition.

We find that the words "Board of Trustees" appearing in that paragraph of the codicil of the said will, reading as follows, to-wit:

> "It is my will and desire, and I direct that in determining all questions as to voting said stock, and as to carrying out the provisions of the trust created by this codicil, the members of the Board of Management as Trustees, shall vote as a unit, and the members of the Board of Operatives as Trustees, shall vote as a unit, the vote of each group to be determined by the majority vote of the members of the respective Boards; and that in the event of the failure of the respective groups of trustees to agree upon any question said question in dispute shall be referred to the Board of Trustees whose decision on said question in dispute shall be final."

should be construed to mean and designate the Board of Directors of the American Cast Iron Pipe Company; so that the said paragraph shall read as follows:

"It is my will and desire, and I direct that in determining all questions as to voting said stock, and as to carrying out the provisions of the trust created by this codicil, the members of the Board of Management as Trustees shall vote as a unit, and the members of the Board of Operatives as Trustees shall vote as a unit, the vote of each group to be determined by the majority vote of the members of the respective Boards; and that in the event of the failure of the respective groups of Trustees to agree upon any question, said question in dispute shall be referred to the Board of Directors of the American Cast Iron Pipe Company, whose decision on said question in dispute shall be final."

This the 15th day of December, 1924.

S/R. A. Agnew-Foreman

MRS. SUSAN YOUNG EAGAN) AND MARION M. JACKSON,) As Executors of the Last) Will and Testament of) JOHN J. EAGAN, DECEASED)) VS.)) W.D. MOORE, ET AL.)	IN THE SUPERIOR COURT OF FULTON COUNTY, GEORGIA. PETITION TO CONSTRUE THE WILL OF JOHN J. EAGAN.

DECREE OF THE COURT

The petition of Mrs. Susan Young Eagan and Marion M. Jackson, as Executors of the last will and testament of John J. Eagan, deceased, against W. D. Moore, C. D. Barr, Paul A. Ivy, Claude Nail, Wade Howard, W. R. Bryant, A. J. Bryant, Ed Dougherty, A. H. Smith, John Ogletree, Jess Henson, Will Davis and M. J. Wilson, as Trustees for the employees of the American Cast Iron Pipe Company, for the wives and children of said employees and for the general public, and against said W. D. Moore, C. D. Barr, Paul A. Ivy, Claude Nail, Wade Howard, W. R. Bryant, A. J. Bryant, Ed Dougherty, A. H. Smith, John Ogletree, Jess Henson, Will Davis and M. J. Wilson in their capacities as employees of said American Cast Iron Pipe Company, and as such, representatives of all other employees and of all future employees of said American Cast Iron, and American Cast Iron Pipe Company, as a corporation, having come on to be heard, and the same having been submitted to a jury duly and lawfully impanelled, and evidence and argument having been submitted to the jury and the jury having returned a verdict finding for the petitioners that the will be construed in accordance with the prayers of petition.

IT IS ORDERED, ADJUDGED AND DECREED that the said verdict of the jury in this cause be entered upon the Minutes of this Court, and that the same be, and it is hereby made the judgment and decree of this Court.

Let the defendant, American Cast Iron Pipe Company,

pay the costs of this proceeding.

In open court, this the 15th day of December, 1924.

_____

S/W. D. Ellis
Judge Superior Court, Atlanta Circuit.

MRS. SUSAN YOUNG EAGAN and M. M. Jackson, Extra,	)	
vs.	)	#61106
W. D. Moore, et al.	)	

VERDICT

We, the jury, find for the petitioners that the bequest of one thousand eighty-five (1085) shares of the capital stock of the American Cast Iron Pipe Company mentioned in the codicil of the will of said John J. Eagan should be construed to be a charitable bequest, within the meaning of the laws of Georgia, thereby creating a perpetual trust for charitable purposes, in accordance with the allegations of paragraph five (5) of said petition, and the first prayer of the said petition.

We find that the words "Board of Trustees", appearing in that paragraph of the codicil of the said will, reading as follows: to-wit:

> "It is my will and desire, and I direct that in determining all questions as to voting said stock, and as to carrying out the provisions of the trust created by the codicil, the members of the Board of Management as Trustees, shall vote as a unit, the members of the Board of Operatives as Trustees shall vote as a unit, the vote of each group to be determined by the majority vote of the members of the respective Boards; and that in the event of the failure of the respective groups of trustees to agree upon any question said question in dispute shall be referred to the Board of Trustees whose decision on said

question in dispute shall be final."

should be construed to mean and designate the Board of Directors of the American Cast Iron Pipe Company, so that the said paragraph shall read as follows:

> "It is my will and desire, and I direct that in determining all questions as to voting said stock and as to carrying out the provisions of the trust created by this codicil, the members of the Board of Management as Trustees shall vote as a unit, and the members of the Board of Operatives as Trustees shall vote as a unit, the vote of each group to be determined by the majority vote of the members of the respective Boards; and that in the event of the failure of the respective groups of Trustees to agree upon any question, said question in dispute shall be referred to the Board of Directors of the American Cast Iron Pipe Company, whose decision on said question in dispute shall be final."
>
> This the 15th day of December, 1924.
>
> R. A. AGNEW, Foreman.

*****

DECREE OF THE COURT:

The petition of Mrs. Susan Young Eagan and Marion M. Jackson, as Executors of the last will and testament of John J. Eagan, deceased, against W. D. Moore, C. D. Barr, Paul A. Ivy, Claude Nail, Wade Howard, W. R. Bryant, A. J. Bryant, Ed Dougherty, A. H. Smith, John Ogletree, Jess Henson, Will

Davis and M. J. Wilson, as Trustees for the employees of the American Cast Iron Pipe Company, for the wives and children of said employees and for the general public, and against said W. D. Moore, C. D. Barr, Paul A. Ivy, Claude Nail, Wade Howard, W. R. Bryant, A. J. Bryant, Ed Dougherty, A. H. Smith, John Ogletree, Jess Henson, Will Davis and M. J. Wilson, as Trustees for the employees of the American Cast Iron Pipe Company, for the wives and children of said employees and for the general public, and against said W. D. Moore, C. D. Barr, Paul A. Ivy, Claude Nail, Wade Howard, W. R. Bryant, A. J. Bryant, Ed Dougherty, A.H. Smith, John Ogletree, Jess Henson, Will Davis and M. J. Wilson in their capacities as employees of said American Cast Iron Pipe Company, and as such, representatives of all other employees and of all future employees of said American Cast Iron Pipe Company, and American Cast Iron Pipe Company, as a corporation, having come on to be heard and the same having been submitted to a jury duly and lawfully impanelled, and evidence and argument having been submitted to the jury and the jury having returned a verdict finding for the petitioners that the will be construed in accordance with the prayers of said petition.

IT IS ORDERED, ADJUDGED AND DECREED that the said verdict of the jury in this cause be entered upon the Minutes of this Court, and that the same be, and it is hereby made the judgment and decree of this Court.

Let the defendant, American Cast Iron Pipe Company

pay the costs of this proceeding.

In open Court, this the 15th day of December, 1924.

W.D. ELLIS, JUDGE S.C. A.C.

(Marked Exhibit A
Handwritten document)

B 12-17-24

Petition for
Construction of Will

Marion M. Jackson
Susan Young Eagan,
et at. Executors

vs.

W. D. Moore, G. D. Barr, Paul A. Ivy, Claude Nail,
Wade Howard, W. R. Bryant, A. J. Bryant, Ed Dougherty,
A. H. Smith, John Ogletree, Jass Hanson, Will Davis &
M. J. Wilson, (Trustees, etc.) and
American Cast Iron Pipe Company

61106

Alton, Alston, Foster & Moise

August 12	Filing and Docketing Process.....Copy	2.00
October 9	Recording Original 339/531	4.50
November 10	Answer	1.25
November 10	Order	.75
November 18	Respond Answer 327/431	1.50
December 15	Verdict & Decree 104/43	2.00

PAID December 18/24

192 Sheriff's Cost
Service

Attendance 2.00

STATE OF GEORGIA

COUNTY OF FULTON

I, S/Deborah Williams, Deputy Clerk of the Superior 'Court of Fulton County, Georgia, do hereby certify that the within and foregoing is a true and correct copy of Docket Book F-3 Page 269 in the case of: *Mrs. Susan Young Eagan, et al, v. W. D. Moore, et al.*

Civil Action No. 61106, Superior Court, Fulton County, Georgia all of which appears of file and record in this Office.

Given under my hand and seal of Office.
(Seal) This the 10th day of April, 1984.

_____

S/Deborah Williams, Deputy Clerk,
Superior Court Fulton County, Georgia